(26,216)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 749.

PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES H. MINDS AND JULIA A. MATZ, TRADING AS BULAH COAL COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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DOCKET ENTRIES

IN THE
DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF PENNSYLVANIA.

No. 2424. Dec. Sessions, 1912.

John H. Minds. H. W. Moore.		James H. Minds and Julia A. Matz, trading as Bulah Coal Company,
		vs.
Francis I. Gowen. John G. Johnson.		Pennsylvania Railroad Company.
		PROCEEDING TO ENFORCE ORDER OF INTERSTATE COMMERCE COMMISSION.
1913 Feby.	7	Petition filed. Order on defendant to plead, answer or demur within 30 days filed.
" "	10	Proof of service of copy of petition and order to plead, etc., filed.
" March	4	Demurrer filed.
" July	21	Order overruling demurrer with leave to defendant to plead filed.
1915 Aug.	20	Order for the appearance of John G. Johnson, Esquire, for defendant filed. Plea filed.

"	Oct.	8	Order to place case on Trial List filed.
"	Nov.	9	Jury called.
"	"	10	Trial continued.
"	"	11	Juror withdrawn and cause continued.
1916	April	5	Petition to amend original petition filed.
"	"	8	Answer of Pennsylvania Railroad Company to petition for leave to amend original petition filed.
"	"	10	Order granting leave to plaintiff to amend statement filed with exception to defendant filed.
"	"	14	Defendants pleas to amended petition filed.
"	Oct.	9	Jury called (see minutes).
"	"	10	Trial continued.
"	"	11	Trial continued.
"	"	12	Verdict for plaintiff for Thirty-three thousand six hundred eighteen and 37/100 ($33,618.-37).
"	"	16	Defendant's motion and reasons for new trial filed.
"	Nov.	1	Argued sur motion for new trial.
"	"	6	Opinion Dickinson, J., discharging rule for new trial filed.
"	"	8	Supplemental opinion sur motion for new trial filed.
"	"	10	Praecipe for judgment filed. Judgment accordingly.
			Judgment filed.
			Bill of Exceptions filed.
			Order sealing Bill of Exceptions filed.
			Order, Dickinson, J., allowing counsel fee of $6750.00 filed.

"	"	14 Assignments of Error filed.
		Petition for Writ of Error filed.
		Bond sur Writ of Error in $67,-236.74 with United States Guaranty Company as surety filed.
		Order approving Bond sur Writ of Error filed.
		Justification of Surety with power of attorney filed.
		Order allowing Writ of Error filed.
		Writ of Error allowed and copy thereby lodged in clerk's office for adverse party.
		Citation allowed and issued.
		Praecipe for Transcript of Record sur appeal filed.
"	"	15 Citation returned "service accepted" and filed.

WRIT OF ERROR.

UNITED STATES OF AMERICA, *ss.*

THE PRESIDENT OF THE UNITED STATES,

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania.

GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between James H. Minds and Julia A. Matz, trading as Bulah Coal Company, plaintiff, and Pennsylvania Railroad Company is defendant, a manifest error hath

happened, to the great damage of the said Pennsylvania Railroad Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, at Philadelphia, the
(Seal) 14th day of November in the year of our Lord one thousand nine hundred and sixteen.

GEORGE BRODBECK,
Deputy Clerk of the District Court of the United States.

Before DICKINSON, *J.*

Allowed

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

December Term, 1912. No. 2424.

JAMES H. MINDS and JULIA A. MATZ, trading as Bulah Coal Company,
Petitioners,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

PETITION.
Filed Feby. 7, 1913.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

Your petitioners, James H. Minds and Julia A. Matz, trading as Bulah Coal Company, having their principal place of business at Ramey, in Bigler Township, Clearfield County and State of Pennsylvania, and who are citizens of the State of Pennsylvania, and respectively residents of Clearfield County and Schuylkill County, in the said State of Pennsylvania, humbly complaining shows your Honors:

I. Your petitioners are lawfully and rightfully entitled to receive and do hereby claim from the defendant above named, the sum of Eighteen thousand five hundred ninety-one dollars and forty-eight cents ($18,591.48) with legal interest thereon from June 28, 1907, to June 1, 1912, amounting to Five thousand four hundred ninety-seven dollars and ninety-one cents ($5,497.91) being the sum of Twenty-four thousand eighty-nine dollars and thirty-nine cents ($24,089.39)

with legal interest thereon from June 1, 1912, as and for damages and reparation in accordance with a report and order of the Interstate Commerce Commission, dated March 11, 1912, a copy whereof is hereto attached, marked "Exhibit A" and prayed to be made and read as part hereof, and in accordance with the several Acts of Congress in such case made and provided; and the defendant justly and legally owes to petitioners the sum above set forth, together with legal interest thereon from June 1, 1912, and a reasonable attorney's fee to be taxed as part of the costs against defendant.

II. The defendant prior to any and all dates mentioned in this petition was and now is a corporation incorporated under the laws of the State of Pennsylvania and a common carrier, engaged in interstate commerce by transportation of passengers and property by continuous carriage by railroad over their own lines and as connecting carriers from points of origin in Pennsylvania to points outside of Pennsylvania throughout the United States and to Canada and Mexico, and has its principal operating office in Philadelphia, Pennsylvania, in the Eastern District of Pennsylvania, through which said City and in which Eastern District of Pennsylvania the line of said defendant runs and is operated.

III. During the period from the first day of October, 1904, to the twenty-eighth day of June, 1907, the petitioners were lessees of valuable seams and veins of bituminous coal underlying lands situate in Bigler Township, Clearfield County, Pennsylvania, and operated thereon a fully equipped colliery known as Webster No. 4, which colliery was adjacent to the tracks of the Moshannon Branch of the Tyrone and Clearfield Railway, one of the main branches of defendant's line and operated by defendant as its Tyrone Division, and, during said period, petitioners were

continuously engaged in mining coal at said mine and selling it to points outside of the State of Pennsylvania, and maintained at said colliery a full mining equipment and a sufficient force of employees. During the same period the daily capacity of said Webster No. 4 mine was five hundred and sixty (560) tons per working day, which quantity petitioners were always able and prepared during said period to mine, ship and sell, had they been supplied by the defendant with sufficient cars to transport the same, but defendant did not furnish petitioners with sufficient cars to transport their coal as aforesaid, nor did it furnish to petitioners their proper pro rata of the cars upon defendant's line, but in its distribution of railroad cars to mines along its line, the defendant unjustly discriminated against petitioners' mine, Webster No. 4, and gave undue and unreasonable preference and advantage to mines operated by the Berwind-White Coal Mining Company, and other shippers on the Tyrone Division, particularly to shippers whose mines were situated upon the Moshannon Branch of the Tyrone Division in close proximity to Webster No. 4, and having, in common with it, their sole outlet to market by way of defendant's lines, whereby defendant violated its duty as a common carrier and petitioners were put to great and unjust disadvantage and were unable to ship coal to market which they were able to mine, and for the sale of which they had orders for delivery to points outside of the State of Pennsylvania, and because of defendant's refusal to adequately supply petitioners' needs for cars and because of such unjust discrimination against petitioners in the daily car distribution of cars upon defendant's line, and in particular upon the Tyrone Division, petitioners were damaged and suffered loss as producers, shippers and sellers of coal in the interstate coal trade and were deprived of profits which they would otherwise have made upon coal which they were unable to ship and sell, and for which

they were unable to accept contracts, although such contracts were available, by reason of defendant's undue and wrongful discrimination and refusal to properly supply them with cars as aforesaid.

IV. The mines owned, operated and controlled by the Berwind-White Coal Mining Company and other favored companies, as aforesaid, are situated upon the Moshannon Branch of the Tyrone & Clearfield Railway, on the Tyrone Division of said defendant in close proximity to the Webster No. 4 mine owned by petitioners, and have a common outlet with petitioners' said mine to reach the markets for bituminous coal either within or without the State of Pennsylvania, over the lines of the defendant company and there are no circumstances or conditions of carriage as against petitioners' mine, Webster No. 4 aforesaid.

Between October 1, 1904, and June 28, 1907, petitioners made daily requests and gave daily orders for coal cars to be delivered to their said mine, to be loaded with coal for transportation to points and places beyond the State of Pennsylvania, but were denied and refused cars and were unduly and unreasonably discriminated against by defendant in the distribution of coal cars, whereby petitioners were at different times and for varying periods of time compelled to close their operation and hold their mine idle, whereby their miners and laborers removed, their organization and plant became demoralized and disorganized, and whereby petitioners were prevented from filling valuable contracts or from accepting and securing other valuable contracts, to their great damage as herein set forth.

During the period from October 1, 1904, to June 28, 1907, the defendant arbitrarily assigned and furnished to the favored mines aforesaid in the Tyrone Division not less than 143,088 "assigned" (arbitrary) cars, which said cars were assigned as "Individual" and "Foreign" cars, and were not charged against the

pro rata share of said favored mines in making up the distribution sheets for said division, and did not enter into the distribution of the coal cars among the mines of said division, whereby said favored companies were given the cars aforesaid over and above and in addition to their *pro rata* of cars in the division, and were illegally and wrongfully preferred in car distribution as aforesaid in said division. And during the same period petitioners' mine, Webster No. 4, received only a few arbitrary cars, and they were charged against said mine's distributive share in the ratings for the division.

During the same period defendant unduly and unjustly discriminated against the Clearfield Division in which petitioners' said mine was located, by arbitrary award of not less than 640 coal cars per day to other divisions, for the use of favored mines in said division, over and above the proper proportion to which said division were properly entitled, to the prejudice of non-favored mines in the Clearfield Division, and in particular of your petitioners' mine, Webster No. 4.

V. Your petitioners, on the twenty-eighth day of June, 1907, duly filed with the Interstate Commerce Commission a complaint setting forth the unjust, unreasonable and discriminatory practices of defendant to the prejudice of petitioners and in violation of the Act to Regulate Commerce, approved February 4, 1887, and Acts amendatory thereof or supplemental thereto, and praying that a hearing be had upon the allegations set forth in said complaint, and that the Commission make an order awarding complainants therein reparation and damages to such an amount as it might be ascertained that said complainants had suffered. Defendant, being duly served with a copy of said complaint, made answer thereto, issue was joined, and the cause regularly heard and argued by all the parties thereto, and submitted, and resulted in

a finding duly filed and reported by the Interstate Commerce Commission at a general session at its offices in Washington, D. C., on Docket No. 1137, Opinion No. 1455, dated December 5, 1910, a copy of which finding, with the conclusions and orders of the Commission, is hereto attached and marked "Exhibit B" and made a part of this petition.

VI. After the filing of briefs by all parties and oral argument had at a general session of the Commission, and the submission of findings of facts and of law on the part of the complainant and of defendant, upon the question of reparation alone, there resulted a further find regularly and properly made by the Commission on March 11, 1912, ordering the defendant to make reparation to petitioners as in paragraph one of this petition above set forth, and as fully appears in the copy of the report, conclusions and order of the Interstate Commerce Commission in Opinion No. 1833, Docket No. 1137, dated March 11, 1912, a certified copy whereof is hereto attached, marked "Exhibit A" and made a part of this petition.

VII. Petitioners aver that a true copy of the aforesaid order of the Interstate Commerce Commission, dated March 11, 1912, Opinion No. 1833, Docket No. 1137, was duly served upon defendant in the above entitled cause and demand made that defendant pay petitioners the sum claimed in this petition and as set forth in the aforesaid order of the Commission, dated March 11, 1912, "Exhibit C." hereto attached, but that defendant has wholly failed, neglected and refused to pay the said sum or any part thereof, and that no such sum nor any part thereof has been paid by defendant or any one on its behalf to petitioners or any one in their behalf. Wherefore petitioners have instituted this proceeding to enforce the aforesaid order regularly and lawfully made under the Act to Regulate

Commerce, approved February 4, 1887, and the acts amendatory thereof or supplemental thereto.

Wherefore the said James H. Minds and Julia A. Matz, trading as the Bulah Coal Company, as aforesaid, respectfully pray:

First.—That your Honorable Court enter a rule and order upon the said defendant, the Pennsylvania Railroad Company, to file a plea, answer or demurrer to this petition within thirty days from date of service of a copy of the same upon said defendant.

Second.—That your Honorable Court will, by its order, fix a time and place for the trial of this cause, under the provision of the Act to Regulate Commerce aforesaid.

Third.—That your Honorable Court will hear, determine and adjudicate the matter involved in this cause hereinabove recited and the exhibits hereto attached.

Fourth.—That your Honorable Court will enter judgment in favor of petitioners and against the said defendant, the Pennsylvania Railroad Company, for the sum of Twenty-four thousand eighty-nine dollars and thirty-nine cents ($24,089.39), as hereinbefore set forth, with legal interest thereon from June 1, 1912, and costs, including a reasonable attorney's fee.

Fifth.—That your Honorable Court may make such other order or orders in the premises as the necessity of the case may require or as to your Honorable Court may seem meet.

And your petitioners, as in duty bound, will ever pray, etc.

JAMES H. MINDS.

STATE OF PENNSYLVANIA, *ss.*

James H. Minds, one of the above-named petitioners, being duly sworn according to law, doth depose and say that the facts contained in the foregoing petition are true to the best of his knowledge and belief.

JAMES H. MINDS.

Sworn and subscribed to before me
this 31st day of January, 1913.

JOHN B. MCGRATH,
(Seal) *Notary Public.*
My commission expires February 27, 1913.

INTERSTATE COMMERCE COMMISSION,
WASHINGTON.

I, John H. Marble, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached are true copies of the Report and Order of the Commission entered March 11, 1912, in cases No. 1136, James H. Minds and Julia A. Matz, trading as The Bulah Coal Company against Pennsylvania Railroad Company, and No. 1137, James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as The Bulah Coal Company against Pennsylvania Railroad Company, the originals of which are now on file and of record in the office of this Commission.

(Seal) In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of the Commission, this 18th day of January, 1913.

JOHN H. MARBLE,
Secretary of the Interstate Commerce Commission.

Opinion No. 1833.

INTERSTATE COMMERCE COMMISSION.

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

PENNSYLVANIA RAILROAD COMPANY.

No. 1139.

W. F. JACOBY and ISAAC C. WEBER, Trading as W. F. JACOBY & COMPANY,

v.

SAME.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

SAME.

No. 1136.

JAMES H. MINDS and JULIA A. MATZ, Trading as THE BULAH COAL COMPANY,

v.

SAME.

No. 1137.

JAMES H. MINDS, Surviving and Liquidating Partner of JAMES H. MINDS and WILLIAM J. MATZ, Lately Trading as THE BULAH COAL COMPANY,

v.

SAME.

Submitted April 20, 1911; *Decided March* 11, 1912.

Reparation awarded for damages resulting from discriminations practiced by the defendant in the distribution of coal cars.

David L. Krebs, Harry White and *A. M. Liveright* for Hillsdale Coal and Coke Company and Clark Brothers Coal Mining Company.

William A. Glasgow, Jr., and *John H. Hall* for W. F. Jacoby & Company.

H. W. Moore, George M. Roads, John H. Minds, William H. Patterson and *James H. Gleason* for Bulah Coal Company.

George V. Massey, Francis I. Gowen and *Murray & O'Laughlin* for defendant.

SUPPLEMENTAL REPORT OF THE COMMISSION.

HARLAN, *Commissioner*:

In *Joynes v. P. R. R. Co.*, 17 I. C. C., 361, it was alleged that the defendant had given a preferred use of its terminal facilities in Pittsburgh to certain shippers of fruits and vegetables, in consequence of which the complainant had sustained loss by reason of the decay of certain of his shipments due to the delay in setting his cars at the unloading platform. We declined to make an award, three Commissioners dissenting, on the ground that this Commission was not authorized under the act to award damages of that character. The general principle announced was that money demands of that nature, arising out of discriminations ascertained and found by the Commission to have been practiced by an interstate carrier, are cognizable only in the courts, and that our jurisdiction extends to what is there referred to as rate damages, as distinguished from general damages of the kind demanded.

These complaints, in which the same defendant was charged with discrimination in the distribution of its coal-car equipment and in which general damages are alleged to have been sustained by the petitioners by reason of its unlawful practices in that regard, were then pending before the Commission. While they were still under consideration and after our con-

clusions in *Joynes v. P. R. R. Co., supra,* had been announced, the Circuit Court of the United States for the Eastern District of Pennsylvania, in *Morrisdale Coal Co. v. P. R. R. Co.,* 176 Fed., 748, dismissed an action for damages alleged to have been sustained by reason of the same rules and regulations of the Pennsylvania Railroad respecting the distribution of its coal cars as are involved in the cases now before us. The claim was based on discrimination, and the authority of the Court had been invoked not only to determine that discrimination had been practiced by the defendant against the plaintiff, but also to ascertain and enter judgment for the damages so sustained. The Court held that this Commission alone could entertain a complaint of that nature. See also *Morrisdale Coal Co. v. P. R. R. Co.,* 183 Fed., 929.

It will be seen therefore that with respect to the principle announced in *Joynes v. P. R. R. Co., supra,* there is a conflict of view as between the Commission and the very court to which these complainants, if refused any relief here, would doubtless have to resort to secure a judgment for the damages here claimed to have been sustained. In order, therefore, to prevent a failure of justice in these cases, as well as to create an opportunity to secure a final ruling by the courts as to what should be our course of action in the future in such cases, we concluded to proceed with these claims; and having found that undue discriminations had been practiced by the defendant against the complainants, we ordered a reargument on the question of the amount of damages respectively sustained by them by reason thereof.

The history of the complaints, the issues raised by the pleadings, and our course in dealing with them, are fully explained in our previous reports herein. *Hillsdale Coal & Coke Co. v. P. R. R. Co.,* 19 I. C. C., 356; *Jacoby & Co. v. P. R. R. Co.,* 19 I. C. C., 392; and *Bulah Coal Co. v. P. R. R. Co.,* 20 I. C. C., 52. And

therefore, in proceeding for the reasons explained to exercise jurisdiction to award damages, no statement of the facts need be made. It will suffice to refer to our reports in the cases cited. The record has now been carefully studied with a view to arriving at the amount of damages which each of the complainants is shown to have sustained, and we shall briefly announce our conclusions:

Claim of the Hillsdale Company.

We find that as a result of the discriminatory acts of the defendant the Hillsdale Coal & Coke Company was damaged in the sum of $27,193.01, which it is entitled to recover, with interest from May 9, 1907.

The original claim was for $127,855.65, which upon reargument was restated as $108,207.05, based on the assumption of a full car supply. A more conservative claim of $65,434.87 was also made in the brief on reargument, based on an assumed output of 600 tons per day and what is claimed would have been a fair distribution of cars to this division of the defendant's lines and a fair share to these mines. Giving full weight to all that we find of record, however, we have been unable to find any clear basis for awarding this sum. Nor is there sufficient proof to enable us in this claim to make any finding with respect to the damages alleged to have been sustained by reason of the excess cost of mining the coal actually shipped to interstate destinations resulting from the irregular and inefficient working of the mine due to the failure of the defendant to furnish a regular and adequate supply of cars.

In arriving at our conclusion we have divided the time into two periods, the first from October 1, 1903, to March 31, 1906, after which the mines in this district were closed down for several months as the result of a strike; and the second from August 1, 1906, to May 1, 1907. We find the following facts estab-

lished by the complainant's proof, and have used them as factors in calculating the damages:

(*a*) That the complainant's mines, known as Hillsdale Nos. 2 and 3, during each of the two periods could have produced and disposed of an average of 500 tons of coal per working day; and that 22 working days would have been an average working month.

(*b*) That if the complainant had received its proper proportion of the cars available for distribution by the defendant it could have shipped and disposed of 143,880 tons during the first period and 67,795.20 during the second period; that it actually shipped during the two periods 45,059.84 tons and 35,719.25 tons, respectively, making a shortage in its output of 98,820.16 tons during the first period and 32,075.95 during the latter period; that of this tonnage 87,831.36 tons would have moved to points without the State of Pennsylvania during the earlier period and 15,662.68 during the latter period. In other words, we find that the quantity of coal which the complainant was prevented from selling and shipping to interstate destinations as the result of the discrimination against it in the matter of car supply was 87,831.36 tons and 15,662.68 tons for the periods named.

(*c*) That the average selling price for the coal at the mine for interstate markets would have been $1.0711 per ton during the first period and $1.1320 during the second period; that the cost of production during the same periods with its proper proportion of cars would have been 81 cents and 86 cents per ton, respectively; and that the profit lost on the shipments and sales which the complainant was prevented by the discriminatory acts in question from making during the first period was 26.11 cents per ton and during the second period 27.2 cents.

We have attached no importance to the fact, but for a better understanding of the situation it may be well to state, that this complainant has recovered of the

defendant a judgment in the sum of $17,500 in an action in the State courts similar to this proceeding, but relating only to intrastate traffic. *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 229 Pa., 61; 78 Atl., 28.

Claim of Jacoby & Company.

We find that by reason of the discriminations ascertained and set forth in our report in *Jacoby v. P. R. R. Co.*, 19 I. C. C., 392, the complainants were damaged to the extent of $21,094.39, which they are entitled to recover with interest from June 28, 1907.

The claimants here demand $51,950.49. The award above made we base upon evidence adduced of record, from which we find:

(*a*) That the fair rating of the mine for the time in question, as fixed by the defendant and not objected to by the complainants, was 450 tons per day.

(*b*) That during the period from April, 1904, to March 31, 1905, the mine was operated 275 days; and that during the second period named on the exhibits, from April 1 to October 18, 1905, it was operated 138¼ days.

(*c*) That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods.

(*d*) That the average selling price of the complainants' product for the first period was $1.212 per ton, and in the second period $1.1670; that the cost of production, based on economical operation of the mine with a fair car supply, would have been 92 cents during the entire period of the action; and that the profit during the first period would therefore have been 29.2 cents and during the second period 24.7 cents per ton.

This measures the loss on the tonnage which the complainant was unable to ship.

(*e*) That the actual cost of production is shown by the record as $1.016 per ton during the first period and $1.049 per ton during the second period, making an excess of 9.6 cents and 12.9 cents for the respective periods in the actual cost of production under the conditions obtaining, as compared with what would have been the cost based on a fair car supply as heretofore stated. This is the basis adopted for computing the loss sustained by these complainants in diminished profits on the coal actually shipped during the period in question.

We further find that the complainants in the sale of their mine realized a profit of $7,500 over the purchase price which they had paid. But we do not undertake to say whether or not this amount or any part of it should be deducted from the amount of reparation here awarded.

Claim of Clark Brothers Company.

The discrimination practiced by the defendant against Clark Brothers Coal Mining Company is set forth in *Jacoby v. P. R. R. Co.*, 19 I. C. C., 392. We now find that the damages sustained by this claimant as the result thereof amounted to $31,127.96, and that it is entitled to an award of reparation in that sum, with interest from June 25, 1907.

The amount of its claim as stated in the original petition was $36,401.12. Our findings of fact, on which we arrive at this conclusion, are as follows:

(*a*) That the mines known as Falcon Nos. 2, 3 and 4 had an average output capacity of 600 tons, 120 tons and 275 tons per working day, respectively, for the period of the action; and that 20 working days would have been an average working month.

(*b*) That dividing the time in question into two periods, one prior to March 31, 1906, and the other

from August 1, 1906, to May 1, 1907, as we have done in the *Hillsdale case, supra,* the complainant could have disposed of and shipped 38,537.40 tons from Falcon No. 2 during the first period and 74,498.40 tons during the second period; that it actually shipped from that mine 11,812.76 tons and 21,326.18 tons in the respective periods, making a shortage in the output of 26,724.64 tons during the first period and 53,172.22 tons during the second period; and that of this tonnage it would have shipped and sold at interstate destinations 19,086.73 tons during the first period, and 35,109.61 tons during the second period.

(*c*) That from Falcon No. 3 the complainant could have shipped and sold 7,707.48 tons during the first period and 14,899.68 during the second period, if it had received its proper share of equipment; that it actually shipped from this mine during those periods 1,184.66 tons and 3,018.90 tons, respectively, making its output 6,522.82 tons during the first period and 11,880.78 during the second period less than it would have been with the proper car supply; and that of the figures last mentioned it would have shipped to points without the State of Pennsylvania 3,866.72 tons and 6,423.93 tons in the respective periods.

(*d*) That with its proper proportion of cars the mine known as Falcon No. 4 could have produced, sold and shipped during the first period 12,210 tons and during the second period 34,145.10 tons, whereas it actually was able to ship but 2,306.12 tons and 11,105.45 tons; that it therefore shipped 9,903.88 tons during the first period and during the second period 23,039.65 tons less than it would have sold and shipped with its proper proportion of the cars; and that of this shortage 9,184.85 tons represents what would have been interstate business during the first period, and 8,497.02 tons during the second period.

(*e*) That the average selling price of the coal mined at Falcon No. 2 during the first period was $1.289 per ton and during the second period $1.25 per

ton; that the cost of production at that mine, based on a fair car supply, would have been 92 cents per ton and 96 cents per ton during the respective periods; that the average selling price of the coal from Falcon No. 3 was $1.20 during both periods and the cost of production 92 cents and 96 cents during the two periods; that the average selling price at Falcon No. 4 was $1.07 per ton during the first period and $1.132 per ton during the second period, and that the cost of production at that mine was 82 cents per ton and 86 cents per ton during the respective periods. The profit that would have accrued on the output of the respective mines was therefore as follows: Falcon No. 2, 36.9 cents and 29 cents; Falcon No. 3, 28 cents and 24 cents; and Falcon No. 4, 25 cents and 27.2 cents per ton. This measures the loss on the tonnage which the complainants were unable to ship.

(*f*) That the actual cost of production is shown by the record as $1.1419 per ton during the first period and $1.2063 per ton during the second period at Falcon No. 2; that the actual cost at Falcon No. 3 was $1.166 per ton during the first period and $1.311 per ton during the second period; that the actual cost at Falcon No. 4 was $1.017 and 90 cents during the respective periods; and that the excess over the cost of production, as shown in the preceding paragraph herein, resulting from the irregular car supply, was 22.19 and 24.63 cents per ton, respectively, at Falcon No. 2; 24.6 and 35.1 at Falcon No. 3, and 19.7 and 4 cents for the respective periods at Falcon No. 4. This is the measure we have used in arriving at the loss sustained by these complainants in increased cost of producing the coal actually sold and shipped to interstate points during the period in question.

Claim of Bulah Coal Company.

Following our conclusion in *Bulah Coal Co. v. P. R. R. Co.*, 20 I. C. C., 52, that the defendant had unlawfully discriminated against these complainants, we

now assess the damages resulting therefrom at $50,307.05, with interest from June 28, 1907.

The reparation prayed for by the complainants aggregates $155,401.59. In our previous report we took April 12, 1904, as the date for dividing the period of the action. Upon further reflection October 1, 1904, seems more proper, that being the date of the formation of the new co-partnership. In arriving at the foregoing amount of reparation we have therefore considered the matter in two periods, one prior and the other subsequent to that date, and make the following findings:

(*a*) That the fair rating of the mine, fixed by the defendant without objection by the complainants, was 560 tons during both of the periods referred to.

(*b*) That 22 working days would in this case have been an average working month, although it is alleged that the mine could have been worked 26 days per month.

(*c*) That if the complainants had received their proper proportion of the cars available for distribution they could have mined, sold and shipped 120,415.68 tons during the first period and 214,257.12 tons during the second period; that they actually shipped during the two periods 110,892 and 143,000 tons, respectively, making a shortage in their output of 9,523.68 tons in the first period and 71,257.12 tons for the second period; and that of this tonnage 3,878.04 tons during the first period and 48,540.34 tons during the second period would have moved to and have been sold at interstate destinations.

(*d*) That the average profit on orders received by the complainants for points without the State of Pennsylvania, and which were canceled and unfilled as the result of lack of their fair proportion of available equipment, would have been 71.8 cents per ton during the first period and 25.2 cents per ton during the latter period. This measures the complainants'

loss on the coal which they were unable to ship during the period of action, and the damages allowed on this ground aggregate $15,016.60.

(*e*) That the cost of production at the complainants' mine during the first period was $1.23 per ton on the average, and during the second period $1.08; that the cost of production would have been 88 cents per ton during both periods if a non-discriminatory share of the car supply had been received; and that the excess in the actual cost of production of the coal mined and shipped to interstate destinations resulting from the discrimination in car supply was therefore 35 cents per ton during the first period and 20 cents during the second period. This is the measure of the complainants' damages in the excess cost of production on the coal actually sold and shipped to points outside the State of Pennsylvania during the period of the action; and the damages awarded on that ground aggregates $35,290.45.

In cases of this kind there is a natural tendency on one side to enlarge and on the other to minimize the claim made. This is characteristic of the record before us. Damages are claimed by the petitioners to an extent not supported by the evidence adduced; on the other hand, the defendant has not sought so much to help the Commission to arrive at a correct award as to show the fallacious character of the factors adopted by the complainants in arriving at their estimates of their damages. The result is a record that is not so helpful as it might be. The responsibility for this, however, rests with the parties; in such a case we can accept only the responsibility that follows upon a careful study of the record and an earnest effort to weigh all the evidence before us and to reach such conclusions as it fairly justifies.

Many theories as to the elements that should be considered in estimating damages in a case of this kind were advanced by each side. It is said by the

complainants that their damages should be estimated on the basis of a supply of coal cars according to the physical capacity of their mines, or at least on the basis of their rated capacity. We have dealt with the claims only on the basis of the fair proportion of the available equipment that each claimant was entitled to receive in view of what we here find would have been a proper rating for each operation. According to the argument and brief on behalf of the defendant there is no sound theory upon which the damages of the complainants may be calculated. The defendant contends in all these cases that the coal which the complainants were unable to mine because of their failure to obtain their fair share of cars still remained in the ground, and that the extent of the damage really suffered can not therefore be ascertained without proof, showing that the coal when subsequently mined was sold at a less profit than might have been realized during the period of the action. We are not prepared to enter upon a discussion of that question. Such claims are clearly justiciable, and we know of no better guide or basis for our action than the rule followed by the courts in similar cases. In the action by the Hillsdale Coal & Coke Company in the State courts, to which reference has heretofore been made, the Supreme Court of Pennsylvania, in 229 Pa., 261; 78 Atl., 28, said:

> "As we look at it, the only known method to get at data from which to estimate what a man is damaged by reason of discrimination, in not furnishing cars or other facilities of transportation, is to give the shipper discriminated against what would have been a reasonably fair profit on whatever is shown to be the fairly probable output of the mine discriminated against, less what was actually shipped from that mine. * * * Counsel for appellant argued that because, as a result of the defendant's discrimination, the coal of the plaintiff was left in the ground, and might be

available for future shipment, and as there was no evidence that prices which prevailed throughout the period of the action were abnormal, or in excess of those reasonably ruling, there was no room for the inference that the plaintiff would realize for his coal when it might be shipped in the future less than it would have realized if shipped during the period of the action. But the burden was upon the defendant to show anything of this kind, by way of mitigation of damages, if it could do so, and it offered no evidence for any such purpose."

We do not undertake to say whether this is a correct rule, but simply refer to the case in explanation of our findings.

Orders will be entered in accordance with these conclusions.

SUPPLEMENTAL ORDERS.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 11th day of March, A. D. 1912.

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with

the report herein of March 7, 1910, 19 I. C. C. 356, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainant, Hillsdale Coal & Coke Company, on or before the 1st day of June, 1912, the sum of $27,193.01, with interest thereon at the rate of 6 per cent. per annum from May 9, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1139.

W. F. JACOBY and ISAAC C. WEBER, Trading as W. F. JACOBY & COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C., 392, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainant, W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Company, on or before the 1st day of June, 1912, the sum of $21,094.39, with interest thereon at the rate of 6 per cent. per annum from June

28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C., 392, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainant, Clark Brothers Coal Mining Company, on or before the 1st day of June, 1912, the sum of $31,-127.96, with interest thereon at the rate of 6 per cent. per annum from June 25, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1136.

JAMES H. MINDS and JULIA A. MATZ, Trading as The BULAH COAL COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of December 5, 1910, 20 I. C. C., 52, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainants, James H. Minds and Julia A. Matz, trading as The Bulah Coal Company, on or before the 1st day of June, 1912, the sum of $31,715.57, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1137.

JAMES H. MINDS, Surviving and Liquidating Partner of JAMES H. MINDS and WILLIAM J. MATZ, Lately Trading as THE BULAH COAL COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted

by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of December 5, 1910, 20 I. C. C., 52, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainant, James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as The Bulah Coal Company, on or before the 1st day of June, 1912, the sum of $18,591.48, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

By the Commission.

JOHN H. MARBLE,
(Seal) *Secretary.*

INTERSTATE COMMERCE COMMISSION,
WASHINGTON.

I, John H. Marble, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached are true copies of the Report and Order of the Commission entered December 5, 1910, in cases No. 1136, James H. Minds and Julia A. Matz, trading as the Bulah Coal Company, against Pennsylvania Railroad Company, and No. 1137, James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as The Bulah Coal Company against Pennsylvania Railroad

Company, the originals of which are now on file and of record in the office of this Commission.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of the Commission, this 18th day of January, 1913.

(Seal)

JOHN H. MARBLE,
Secretary of the Interstate Commerce Commission.

Opinion No. 1455.

BEFORE THE
INTERSTATE COMMERCE COMMISSION.

No. 1136.

JAMES H. MINDS AND JULIA A. MATZ, TRADING AS THE BULAH COAL COMPANY,

v.

PENNSYLVANIA RAILROAD COMPANY.

No. 1137.

JAMES H. MINDS, SURVIVING AND LIQUIDATING PARTNER OF JAMES H. MINDS AND WILLIAM J. MATZ, LATELY TRADING AS THE BULAH COAL COMPANY,

v.

SAME.

Submitted February 1, 1909.
Decided December 5, 1910.

REPORT AND ORDER OF THE COMMISSION.

Upon complaint that the defendant's system of rating mines and distributing its coal-car equipment is discriminatory, it is so found, and *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 19 I. C. C. Rep., 356,

and the other cases in that group of cases, are cited and reaffirmed. The question of damages is reserved for further argument.

H. W. Moore, George M. Roads, John H. Minds, William H. Patterson, David L. Krebs, and *James H. Gleason* for complainants.

Francis I. Gowen, George V. Massey, and *Murray & O'Laughlin* for defendant.

REPORT OF THE COMMISSION.

HARLAN, *Commissioner*:

On or about April 12, 1904, a member of the copartnership that filed the first of these two complaints died, and his place in the firm was taken by his widow. This change in interest is the explanation of the two complaints; the first one prays for damages in the sum of $80,174.60, alleged to have been sustained prior to that date, and the second demands an award in the sum of $75,226.99 for damages alleged to have been suffered after that date. The claims in each case are based upon the allegation that the defendant was guilty of unjust discrimination against the complainants in the distribution of its coal-car equipment during the period covered by the complaints and also failed to furnish the complainants with an adequate supply of cars. We are also asked to require the defendant hereafter to furnish the complainants, in the daily distribution, with their just proportion of its available coal-car equipment, that proportion to be ascertained by the physical output capacity of the mines served by the defendant, without regard to their so-called commercial capacity.

This question in all of its aspects was fully considered in *Hillsdale Coal & Coke Co. v. P. R. R. Co.,* 19 I. C. C. Rep., 356; *Jacoby & Co. v. P. R. R. Co.,* 19 I. C. C. Rep., 386; and the other cases there referred to and which were disposed of at the same time. It will not

be necessary therefore again to consider it here. It will suffice to say that we find upon this record that the defendant, during the period covered by these actions, was guilty of an undue and unjust discrimination against the complainants, by reason of the enforcement of the rules then in effect for the distribution of its available coal cars among the mining operations that it served; and an order in that regard will be entered herein substantially similar to the orders entered in the cases above mentioned. As those orders require the defendant to put in effect for the future a non-discriminatory system of car distribution no further order in that regard need be entered here.

In addition to the damages alleged to have been suffered by the complainants by reason of the defendant's rules of distribution, there are one or two other matters that must be mentioned. The mine of these complainants, known as Webster No. 4, is in the vicinity of the operations involved in *Jacoby & Co. v. P. R. R. Co., supra,* and is connected by a switch track with the defendant's Moshannon branch. It produces a superior quality of soft coal that is used for steaming and forging purposes and also as a domestic coal; it is in good demand and brings a high price in the markets of consumption. The tipple, mining machinery, and the general development of the mine were designed for a shipping capacity of from 1,000 to 1,200 tons of coal per working day. Its capacity, as rated by the defendant in 1906, was 16 thirty-five ton cars per day, or 560 tons, indicating a maximum monthly output of 14,000 tons. At the same time the defendant rated Eureka Mine No. 7, about half a mile distant on the same mineral and surface estates and belonging to the Berwynd-White Coal Mining Company, at 14 cars per day. Although defendant gave the two mines about the same rated capacity, the latter mine seems to have received not only a more substantial and regular supply, but a larger number of cars each month.

On that point the defense interposed is that the petitioners received their fair proportion of the entire number of cars distributed on the Tyrone division, and therefore have no ground for complaint. A similar defense was made in *Hillsdale Coal & Coke Co. v. P. R. R. Co., supra,* but we there held that under the law a shipper has the right not only to receive its fair and full proportion and use of a carrier's equipment and facilities, but may protest against the giving to a competitor of a supply of cars in excess of his fair and just proportion. We repeat that principle here. It is one of great importance in coal-mining operations, as all will agree who have looked into such matters. One of the evils lying at the root of the trouble is that the mine that has a larger and more constant supply of cars may not only be operated at less cost, but, what is equally if not more important, such a mine is able to attract miners from the other mines because of the assurance it gives of a more constant opportunity to earn a daily wage.

The greater regularity of the car supply made available to the Berwynd-White Coal Mining Company operations, as is pointed out in *Jacoby & Co. v. P. R. R. Co., supra,* is partly explained by the fact that that company not only owned a large supply of private cars, but had railway-fuel contracts which, under the rules for distribution then in effect, resulted in giving it a large and regular number of assigned cars. This discrimination, as was pointed out in the cases referred to, resulted from the rules then in effect and need not be further considered here. In this connection it may be well to say that the complainants predicate a part of their damages upon the fact that in 1902 the defendant sold 1,000 of its system coal cars to the Berwynd-White Coal Mining Company, 500 to the Keystone Coal & Coke Company, and 700 to the Ellsworth Coal Company. The defendant meets this claim by asserting that if these cars had been retained as system cars

they would have added to the car supply of the complainants during the time in question only a fraction of a car per day. We have not verified this assertion, but any damage resulting from the sale by the defendant of a portion of its own equipment to other coal companies is substantially covered by our finding that the proper practice in the distribution of all available cars was to count all assigned cars against the equipment of the mine receiving them.

The complainants characterize as a special discrimination against their mine the fact, as is alleged, that they repeatedly had great difficulty in getting the trainmen and agents of the defendants to place on their siding and at their tipple the cars that had been assigned for delivery to them. It is said that the cars were frequently left at the foot of the siding and that the complainants had to pull them into place with mules. It is also said that the cars were frequently delivered so late in the morning as not to leave them available during that day, and that cars delivered late in the day were not infrequently charged against that day's quota of cars and against the quota of the following day as well. On these matters, however, we do not find a sufficient basis in the record for affirmative conclusions or anything to indicate that the complainants, in those respects, were put by the defendants on any less favorable basis than their competitors.

Another fact which is made a ground for a claim of damages is that in 1903 the complainants asked the privilege of purchasing certain cars for use in transporting coal from their mine, but were informed by the defendant that they were discouraging the use of new individual car contracts. Later the complainants negotiated for the purchase of 100 wooden gondola cars, which at that time were in actual use in the transportation of coal by another mining company over the lines of the defendant; but the defendant declined to permit their use by the complainant on the ground that

the cars were not up to standard. The negotiations were therefore not carried to a conclusion, but apparently the cars were still in use, when these complaints were filed, for the transportation of coal by the defendant for other shippers. Later there was some controversy with respect to the use of 25 new steel cars purchased by the complainants for their own use, but which were kept temporarily out of service, pending some dispute between the complainants and the defendant with respect to the terms of the contract covering their use as private cars.

While there are also other things shown of record which put the defendant on explanation and properly subject it to just criticism, the only point upon which the record affords a sufficient basis for affirmative findings grows out of the rules and system then in effect for the distribution of available equipment among the various coal mining operations. We have condemned that system in the cases heretofore alluded to and found it to be unduly and unjustly discriminatory, and we have so found here. But as was the case with those proceedings we desire further light on the amount of the damages thus sustained. The latter question will therefore be set for further argument at the time when the same question is argued in the group of cases heretofore mentioned. The special reasons for entering upon the consideration of the question of damages in these cases have been explained in *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 19 I. C. C. Rep., 356.

An order will be entered in accordance with these conclusions.

PROUTY, *Commissioner*, dissenting: Without restating my views in this proceeding I desire it to be understood that my dissent in the case last cited is equally applicable here. In that dissent Commissioner Clements joined. It is the desire also of Commissioner Lane to be understood as entertaining in this proceed-

ing the same views respecting the lawful basis for rating mines for the distribution of coal cars that are expressed in his dissenting opinion in the case last mentioned.

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at is office in Washington, D. C., on the 5th day of December, A. D. 1910.

Present:

MARTIN A. KNAPP,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
FRANCIS M. COCKRELL,
FRANKLIN K. LANE,
EDGAR E. CLARK,
JAMES S. HARLAN,
} Commissioners.

No. 1136.

JAMES H. MINDS AND JULIA A. MATZ, TRADING AS THE BULAH COAL COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

No. 1137.

JAMES H. MINDS, SURVIVING AND LIQUIDATING PARTNER OF JAMES H. MINDS AND WILLIAM J. MATZ, LATELY TRADING AS THE BULAH COAL COMPANY,

v.

SAME.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the mat-

ters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof; and it appearing that it has been the defendant's rule, regulation, and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage periods, to deduct the capacity in tons of foreign railway fuel cars, private cars, and system fuel cars, in the record herein referred to as "assigned cars," from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all "unassigned" cars:

It is ordered, That the said rule, regulation, and practice of the defendant in that behalf unduly discriminates against the complainants herein and is in violation of the third section of the act to regulate commerce.

It is further ordered, That the question of the damages claimed by the complainants in these proceedings in respect of the matters and things in said report found to be discriminatory be deferred pending further argument in the premises.

NOTICE.

To the Pennsylvania Railroad Company, Defendant in above case:

Attached hereto will be found a true copy of the order made by the Interstate Commerce Commission dated March 11, 1912, Opinion No. 1833, Docket 1137, awarding to the complainants the sum of Eighteen thousand five hundred ninety-one dollars and forty-eight cents ($18,591.48), with legal interest thereon from June 28, 1907, to June 1, 1912, as and for damages and reparations and in accordance with the report and order of the Interstate Commerce Commission.

Demand for payment thereof is now formally made on behalf of the complainants and unless payment of this award is received by February 5, 1913, a petition will be filed in the United States Court for the purpose of enforcing the order and award aforesaid.

H. W. Moore,
Atty. for Petitioner.

ORDER OF COURT.
Filed Feby. 7, 1913.

And now, February 7th, 1913, the petition of James H. Minds and Julia A. Matz, trading as Bulah Coal Company, complainants in the above proceedings having been filed and the averments thereof considered it is ordered that the Pennsylvania Railroad Company, defendant, be and is directed and ruled to file a plea, answer or demurrer to said petition within thirty days of the service of a copy of said petition together with a copy of this order or judgment sec. leg.

J. W. Thompson, *J.*

DEMURRER OF DEFENDANT TO PETITION OF THE PETITIONERS.
Filed March 4, 1913.

The Pennsylvania Railroad Company, the defendant in the above entitled action, by protestation, not confessing or acknowledging all or any of the matters or things in the said petition contained to be true in such manner and form as the same are therein set forth and alleged, demurs to the said petition, and for causes of demurrer shows:

1. That it appears from the petition itself that the petitioners are not entitled to maintain the action.

2. That it appears from the petition that the action or proceeding has been brought to recover the amount of a certain award made in favor of the petitioners and against the defendant by the Interstate Commerce Commission, which said award the said Commission was without authority to make, because the authority conferred by the Acts of Congress creating the said Commission and defining its powers and jurisdiction does not extend to nor include the making of awards of the character of that which forms the basis of the present action, nor has the said Commission been empowered by said Acts of Congress to entertain claims for damages of the character asserted by the petitioners in the proceeding instituted by them before the Commission which eventuated in the making of the said award.

Wherefore, and for divers other good causes of demurrer appearing on the said petition, this defendant doth demur thereto. And it prays the judgment of this Honorable Court, whether it shall be compelled to make any answer to the said petition; and it humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

JOHN G. JOHNSON,
Solicitor and Counsel for Defendant,
The Pennsylvania Railroad Company.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

JOHN G. JOHNSON,
Of Counsel for Defendant, The Pennsylvania Railroad Company,
Philadelphia, March 1, 1913.

STATE OF PENNSYLVANIA, }
CITY AND COUNTY OF PHILADELPHIA. } *ss.*

Lewis Neilson, being duly sworn, deposes and says: I am Secretary of the Pennsylvania Railroad Company, the above named defendant. The foregoing demurrer is not interposed for delay.

LEWIS NEILSON.

Sworn to before me this 28th day of February, 1913.

HENRY E. CAIN,
(Seal) *Notary Public.*
Commission expires February 21, 1915.

ORDER OF COURT.
Filed July 21, 1913.

Before THOMPSON, *J.*

AND NOW, to wit: this 21st day of July, 1913, IT IS ORDERED that the Demurrer in the above entitled cause be overruled, with leave to plead, &c.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

PLEA.
Filed Aug. 20, 1913.

Defendant in the above pleads "Not Guilty."

JOHN G. JOHNSON,
Attorney for said Defendant.

August 20th, 1913.

(For Petition to Amend Original Petition and Amended Petition, see page 41 of Record in case of James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company.)

SUR PETITION FOR LEAVE TO AMEND ORIGINAL PETITION.

ANSWER OF THE PENNSYLVANIA RAILROAD COMPANY.
Filed Apr. 8, 1916.

To the Honorable the Judges of said Court:

The Pennsylvania Railroad Company, the defendant in the above entitled action, respectfully submits that leave should not be granted to file the amended petition which the plaintiffs ask leave to file, for the following reason:

The proceeding, as the petition discloses, is one brought to recover the amount of an award averred in the petition to have been made by the Interstate Commerce Commission on March 11, 1912.

The award, as now appears, for the recovery of which the proceeding was brought, was not made in favor of the plaintiffs, and the purpose of the present petition is to permit the plaintiffs to so amend their original petition as to enable them now to recover the amount of an award which was made by the Interstate Commerce Commission in favor of the petitioners.

The Interstate Commerce Act provides that "a petition for the enforcement of an order (i. e., of the Interstate Commerce Commission) for the payment of money shall be filed in the Circuit Court or State Court within one year from the date of the order, and not after."

The date of the order making the award for the recovery of which the plaintiffs now desire to proceed was, as already stated, March 11, 1912, so that at the present time more than four years have elapsed from the date thereof. The petitioners, therefore, it is respectfully submitted, cannot now file a petition for the enforcement of such order.

FRANCIS I. GOWEN,
for Defendant.

April 8, 1916.

ORDER OF COURT.
Filed April 10, 1916.

And now, to wit, this 10th day of April, 1916, Amendment to Petition allowed, exception noted for defendant.

BY THE COURT.

DICKINSON, *J.*

SUR AMENDED PETITION.

PLEAS.
Filed April 14, 1916.

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1. The defendant pleads "Not Guilty".

2. And for a further plea the defendant says that the plaintiff is not entitled to maintain the present proceeding because it says that the order of the Interstate Commerce Commission for the enforcement of which the present proceeding has been instituted was made on March 11, 1912, and by the Act of Congress under which said order was made it is provided that a petition for the enforcement of an order of the character of that for the enforcement of which the present proceeding is brought shall be filed in the Circuit Court

within one year from the date of the order and not after the expiration of such year, and the defendant avers that the petition in the present case for the enforcement of the order making the award in favor of the plaintiff, the amount of which it is seeking to recover, was not filed in this Court within one year from the date of the order, as will appear by an inspection of the Record.

FRANCIS I. GOWEN,
JOHN G. JOHNSON,
for Deft.

(For Bill of Exceptions, see page 65 of the Record in the case of James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company.)

(For Opinion refusing motion for new trial, see page 320 of the Record in the case of James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company.)

(For Supplemental Opinion, see page 327 of the Record in the case of James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company.)

MOTION FOR JUDGMENT UPON THE VERDICT.

Filed Nov. 10, 1916.

AND NOW, to wit, this Tenth day of November, 1916, it is moved that judgment upon the verdict in the above case be entered in favor of the plaintiff and against the defendant.

H. W. MOORE,
JOHN H. MINDS,
Attorneys for Plaintiff.

JUDGMENT.
Filed Nov. 10, 1916.

Before DICKINSON, *J.*

AND NOW, to wit, this 10th day of November, 1916, in accordance with praecipe filed, judgment is hereby entered on the verdict in the above entitled case in favor of the plaintiffs and against the defendant in the sum of Thirty-three thousand, six hundred eighteen and 37-100 ($33,618.37) Dollars.

BY THE COURT.

Attest:

LEO A. LILLY,
Deputy Clerk.

OPINION.
Filed Nov. 10, 1916.

SUR MOTION FOR ALLOWANCE OF ATTORNEY'S FEE.

DICKINSON, *J.*

For the reasons expressed in the opinion filed in James H. Minds et al. vs. Pennsylvania Railroad Company, December Sessions 1912, No. 2422, we allow and tax as a reasonable counsel fee in this case the sum of Six Thousand Seven Hundred and Fifty Dollars ($6750.00) to be collected as part of the costs.

Exception allowed to defendant.

BY THE COURT.

DICKINSON, *J.*

PETITION FOR WRIT OF ERROR.
Filed Nov. 14, 1916.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

AND NOW, November, 14, 1916, comes The Pennsylvania Railroad Company, defendant herein, and says that on or about the 10th day of November, 1916, the said Court entered judgment in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignments of error filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Third Circuit for the correction of errors so complained of, and that the transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

HENRY WOLF BIKLE,
FRANCIS I. GOWEN,
H. W. B.
Attorneys for Defendant.

ASSIGNMENTS OF ERROR.
Filed Nov. 14, 1916.

AND NOW, The Pennsylvania Railroad Company, defendant in this cause, filed with its petition for a writ of error, the following assignments of error, upon which it will rely upon its appeal from the judgment in this court entered in this cause, and which appear in the record and proceedings in this cause.

I.

The learned trial Judge erred in entering the order made by him on the tenth day of April, 1916, granting leave to the plaintiff to amend the original petition filed in this case, the effect of the amendment thus allowed being to enable the plaintiff to assert a cause of action based upon an order of the Interstate Commerce Commission other than the order on which suit had originally been brought, which substituted order had been made by the Interstate Commerce Commission more than a year prior to the date of the allowance of the amendment.

II.

The learned trial Judge erred in charging the jury as follows:

> "Now, gentlemen, there is another question in this case, and that is this: There is a dispute as to the tonnage between these parties to this extent, and that bears also upon this question of cost, and the defendant presents to you this view of it: They figure up—and I will only give you the round figures instead of going into the actual figures, because they are somewhat confusing, but it will give you the idea—the defendant presents this view of it, that the actual total cost of the tonnage which was put out amounted in round figures to $136,000. If the increased tonnage could have been put out at 88 cents, then the total cost instead of being $136,000 would have been only $105,000. The defendant, therefore, presents that view to you.
>
> "Let me see if I can make it clearer by a simpler illustration, and taking small figures, because these large figures are a little confusing. Suppose a man is manufacturing or producing anything, and his total cost for producing it is $123. Now, you inquire how many units of product he has put out, how many anything, no matter what it is, and

you find out he has put one hundred. Now, $123, that it has cost him, divided by one hundred, would give $1.23 per unit, when it has cost him $123 in the aggregate. Now, suppose you increase his units to one hundred and twenty, and you find that according to his calculation that his aggregate cost instead of increasing, as you would naturally expect it to do, in accordance with the increased output, or if it did not increase it would be difficult to understand how it would decrease—and you find that his aggregate cost instead of being $123 has been cut down to $105. You say, 'How can that be? I can easily understand that if a man spends $123 to put out one hundred things his unit cost is $1.23 for each one. That is clear enough. If he only puts out fifty, then his cost for each one is double that. If he puts out two hundred at the same cost, then his cost per unit is half of the $1.23. That is clear enough. But if it costs a man $123 to put out one hundred, how can he possibly put out one hundred and twenty for $105?' Your conclusions would be that there was something wrong in the calculation of unit cost. You must have it too low. That is the question for you to determine in this case, because it bears upon both the aggregates of this claim, and bears upon the unit cost, and therefore we have the testimony which has been adduced before you to show that there is an inaccuracy in the claim presented by the plaintiff in that respect. Of course, gentlemen, while as a mathematical proposition that is obviously true, and that mathematically speaking it would be absurd for a man to say that he could produce one hundred things for $123 but if he increased his output to one hundred and twenty, produced twenty more of the same things in the same way, he would cut down his aggregate cost from $123 to $105. But you are to consider the argument addressed to you by coun-

sel upon the other side, and their explanation of that phenomenon. I do not pretend to present all of it to you, but just enough to give you an illustration. Take a man who is shipping coal, for instance, and all his cars come to him in a regular way at the times at which he may employ his men right at once in filling them, getting them out of the way, bringing empties in and filling them and getting them out of the way the result would be that he could get them out at a unit cost of a certain amount per ton, but if he had the men there and their wages going on and all the other expenses going on, and they were standing there idle doing nothing for an hour or two hours or three hours, or there were breaks and interruptions in the continuity of his work in the one case, then it would be easily understood that under one condition of work it might cost the man $123 to get out one hundred tons, and under the other more favorable conditions of work he might be able to get out one hundred and twenty tons at an aggregate cost of $105."

III.

The learned trial Judge erred in charging the jury as follows:

"In other words, you find the damages as you think they were on June 28th, 1907, and then you add to it such sum as in your judgment will make the money received now the equivalent of that received on June 28th, 1907. That must not exceed six per cent. interest."

IV.

The learned trial Judge erred in that his charge to the jury was inadequate in failing to call to the attention of the jury the evidence introduced by the defendant tending to establish the number of cars to

which the plaintiffs were entitled under the rule of distribution prescribed by the Interstate Commerce Commission.

V.

The learned trial Judge erred in that his charge to the jury was inadequate in failing to call to the attention of the jury the method which must be pursued in determining the number of cars to which the plaintiff was entitled under the rule of distribution prescribed by the Interstate Commerce Commission.

VI.

The learned trial Judge erred in refusing to affirm the third point submitted by the defendant, as follows:

> "3. The Interstate Commerce Commission ascertained the number of cars which the plaintiffs, in the judgment of the Commission, should have received in the period of the action with reference to a rule of distribution promulgated by the Commission after the close of the period of the action. The Commission had no power to make its rule of distribution retroactive, and hence its conclusion or finding as to the number of cars that the plaintiffs should have received, and its award of damages based thereon are invalid and afford no basis for a recovery in the present case."

VII.

The learned trial Judge erred in refusing to affirm the fourth point submitted by the defendant, as follows:

> "4. In determining the number of cars to which the plaintiffs were entitled the Interstate Commerce Commission was not at liberty to disregard the rule of distribution which it had itself promulgated, but was required to ascertain such number in accordance with this rule."

VIII.

The learned trial Judge erred in refusing to affirm the fifth point submitted by the defendant, as follows:

"5. Under the rule of distribution prescribed by the Interstate Commerce Commission the plaintiffs were not entitled in the period of the action to any individual cars belonging to other shippers or to any fuel cars either of the defendant or of any other railroad company if these were consigned to other mines. The plaintiffs were entitled to their own individual cars and to their just and proper share of the cars which the defendant had available for distribution among shippers."

IX.

The learned trial Judge erred in refusing to affirm the sixth point submitted by the defendant, as follows:

"6. If the testimony has satisfied the jury that the Interstate Commerce Commission in arriving at the number of cars which the plaintiffs should have received ascertained this number by treating as justly allotable to them the percentage which their mine rating entitled them to of the aggregate of all the cars which were placed by the defendant at the mines in the region in which the plaintiff's mine was located, regardless of the consideration that there were included in this aggregate a large number of individual cars belonging to other shippers, and fuel cars of the defendant and of other railroad companies, which had been placed at other mines, the method adopted by the Commission for ascertaining the number of cars which the plaintiffs should have received was not in accordance with its own rule and was consequently erroneous, and the finding or conclusion of the Commission as to the number which the plaintiffs should have received was therefore invalid and affords no basis for a recovery in the present action."

X.

The learned trial Judge erred in refusing to affirm the seventh point submitted by the defendant, as follows:

"7. It appears from the evidence that in arriving at the number of additional cars which, in its judgment, the plaintiffs should have received, the Interstate Commerce Commission failed to give effect in certain periods to the rule of the defendant in force at the time and approved by the Commission by which cars placed at mines were counted as part of the mine's quota on each day on which they were available for shipments. This rule was a lawful and proper one, and the Commission was not justified in ignoring or disregarding it."

XI.

The learned trial Judge erred in refusing to affirm the defendant's eighth point, as follows:

"8. The defendant has submitted a statement prepared by a public accountant, purporting to show the number of cars which the plaintiffs would have received if distribution had been made by the defendant in accordance with the rule of the Intrstate Commerce Commission. It appears from this statement that the additional cars to which they would have been entitled would not have exceeded 739 cars. Treating each car as having a capacity of thirty-five tons, the tonnage which could have been transported in these cars would have been 25,865 tons, and this tonnage should be accepted by the jury as representing that which the plaintiffs should have received cars for the shipment of, if the jury believe that the statement prepared by the accountant correctly shows the number of cars which, under the Commission's rule of distribution, plaintiffs were entitled to receive in addition to those which were actually delivered to them."

XII.

The learned trial Judge erred in refusing to affirm the eleventh point submitted by the defendant, as follows:

"11. The evidence adduced upon behalf of the defendant has shown that if the plaintiffs had mined any additional tons in the period of the action, they would have been obliged to pay or expend for each ton the miners' wages, which would have been 63 cents a ton, and the royalty on the coal mined, which would have been not less than ten cents a ton, and that if they had mined 71,257 tons, there would have been additional expenses of 7 cents per ton on account of ventilation and supplies, and 6 cents per ton on account of transportation, making a total additional expense of 86 cents per ton. If the jury believe this testimony as to this additional cost, the cost per ton of the coal mined, including these 71,257 additional tons, would have been $1.00."

XIII.

The learned trial Judge erred in refusing to affirm the twelfth point submitted by the defendant, as follows:

"12. The evidence has shown that if the plaintiffs had mined any additional tons in the period of the action, they would have been obliged to pay or expend for each ton, the miners' wages, which would have been 63 cents a ton, and the royalty on the coal mined, which would have been not less than 10 cents a ton. The additional cost that the plaintiffs would have been subjected to, therefore, had they mined any additional tonnage would have been not less than 73 cents per ton. If the jury believe this testimony as to this additional cost, and there is nothing to contradict it, the cost per ton if 25,865 tons had been mined would have been $1.026."

XIV.

The learned trial Judge erred in refusing to affirm the sixteenth point submitted by the defendant, as follows:

"16. The plaintiffs are not entitled to recover interest on the amount of the award from June 28th, 1907, to the date on which the award was made."

XV.

The learned trial Judge erred in refusing to affirm the seventeenth point submitted by the defendant, as follows:

"17. The plaintiffs are not entitled to recover interest on the amount of the award from the date on which the award was made."

XVI.

The learned trial Judge erred in refusing to affirm the eighteenth point submitted by the defendant, as follows:

"18. Under the law and the evidence the plaintiffs are not entitled to recover and your verdict should be for the defendant."

XVII.

The learned trial Judge erred in entering judgment in favor of the plaintiffs against the defendant upon the verdict of the jury.

XVIII.

The learned trial Judge erred in allowing a counsel fee of $6750.00, since such counsel fee was excessive.

XIX.

The learned trial Judge erred in allowing a counsel fee of $6750.00, since such fee was made with refer-

ence to services of counsel before the Interstate Commerce Commission as well as in connection with the institution and prosecution of the present action in the District Court.

XX.

The learned trial Judge erred in allowing a counsel fee of $6750.00, since such fee was not restricted to the services of counsel rendered in connection with the initiation and prosecution of the case in the District Court.

HENRY WOLF BIKLE,
FRANCIS I. GOWEN,
Attorneys for Defendant.

PRAECIPE SUR TRANSCRIPT OF RECORD.
Filed Nov. 15, 1916.

To the Clerk of the U. S. District Court, E. D. of Pa.:

In making up the transcript of record in the above entitled case you are to include the following:

Docket entries,
Writ of Error,
Petition,
Demurrer to Petition,
Plea,
Memorandum as to Petition to amend original petition,
Answer of Penna. R. R. Co. to Petition to amend Petition,
Order of Court granting leave to amend original Petition,
Pleas to Amended Petition,
Memorandum as to Bill of Exceptions,
" " " Opinion,
" " " Supplemental Opinion,

Praecipe for Judgment—Judgment,
" " " Opinion Sur counsel fees,
Petition for allowance of Writ of Error,
Assignments of Error,
Clerk's Certificate,

and no others.

HENRY WOLF BIKLE,
FRANCIS I. GOWEN,
Attys. for Plff-in-Error.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA. } *sct.*

I, WILLIAM W. CRAIG, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify, that the annexed and foregoing is a true and faithful copy of so much of the Pleas and Proceedings in the case of James H. Minds and Julia A. Matz, trading as Bulah Coal Company, No. 2424 Dec. Sess., 1912, as per praecipe of counsel filed, a copy of which is hereto annexed the transcript of record is to include and now remaining among the records of the said court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, (Seal) this 29th day of November, in the year of our Lord one thousand, nine hundred and sixteen, and in the one hundred and forty-first year of the Independence of the United States.

WILLIAM W. CRAIG,
Clerk District Court U. S.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2195 (List No. 17).

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES H. MINDS and JULIA A. MATZ, Co-partners, Trading as BULAH COAL COMPANY, Defendants in Error.

And afterwards, to wit, on the 30th day of April, 1917, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Joseph Buffington, Hon. John B. McPherson and Hon. Victor B. Woolley, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 19th day of July, 1917, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

In the United States Circuit Court of Appeals for the Third Circuit. March Term, 1917.

No. 2194.

PENNA. RAILROAD CO.

vs.

JAMES H. MINDS, Surviving Partner, &c., Lately Trading as BULAH COAL CO., Plaintiff Below.

March Term, 1917.

No. 2195.

PENNA. RAILROAD CO.

vs.

JAMES H. MINDS and JULIA A. MATZ, Trading as BULAH COAL CO., Plaintiffs Below.

Error to the District Court of the United States for the Eastern District of Pennsylvania.

Before Buffington, McPherson and Woolley, Circuit Judges.

McPHERSON, *Circuit Judge:*

In these cases the plaintiffs filed petitions in the district court to enforce orders of reparation made by the Interstate Commerce Com-

mission (23 I. C. C., 192); the orders being based on the Railroad's discrimination against the Bulah Coal Co. in the distribution of cars: 20 I. C. C., 52. Two periods are involved, one (No. 2194), from July 1, 1902, to October 1, 1904, and the second (No. 2195), from Oct. 1, 1904, to June 30, 1907. The cases were tried together, but separate verdicts and judgments were entered, in No. 2194 for $16,092.92, and in No. 2195 for $33,617.37.

During the first period James H. Minds and William J. Matz, a partnership known as the Bulah Coal Co., leased and operated a bituminous coal mine known as Webster No. 4, situated on the Tyrone Division of the Railroad's system in the Clearfield district of Pennsylvania. The mine had no other outlet to market. Matz died in April, 1904, and Minds continued the operation as surviving partner until October 1. On that date, a new partnership bearing the same name, composed of Minds and Julia A. Matz, the widow, executrix, and sole legatee of William J. Matz, took over the mine and went on with the business until June 30, 1907. During the 5 years in question, whenever the Railroad's available supply of cars was not large enough to carry the aggregate production of the district, the cars were allotted to the mines on a percentage basis, this percentage being determined in accordance with the Railroad's rule.

The Coal Co. objected to the rule as unfair and discriminatory, and in June 1907 attacked it before the Commission. Two proceedings were brought, the first by Minds as surviving partner, covering the first period: the claim was for about $80,000 damages, and in March 1912 a reparation order was entered for about $18,600 with interest from June 28, 1907. The second proceeding was by Minds and Julia Matz, trading as the Bulah Coal Co., and covered the second period; the claim was for about $75,000 damages and the order, also entered in March 1912, was for about $31,700, with interest from June 28, 1907. Neither award was paid, and on each a separate action was brought. By mistake the awards were confused, so that Minds as surviving partner sued on the order entered in favor of Minds and Julia Matz, while Minds and Julia Matz sued on the order entered in favor of Minds as surviving partner. This was an obvious blunder, and on April 10, 1916, the district court allowed the orders to be transposed, the Railroad objecting, then and now, on the ground that such an amendment could not be granted after one year from the date of the orders. As we understand, however, this position is not much relied on, and in any event we see no reason to say anything about it except to approve the action of the district court in setting right what was a plain and harmless mistake. Its correction did the Railroad no possible injury.

In passing on the Coal Co.'s complaints, the Commission decided that the Railroad's rule was wrong, and had resulted in discrimination; and then announced the correct rule, which showed that the Coal Co. had not received its proper quota. The Railroad contends that the Commission has not disclosed the basis on which the rule rests, but has merely stated in effect that the Coal Co. could, and

would, have mined and shipped certain additional tonnage, if its share of cars had been received. This contention is not correct as a reading of the Commission's full reports on this subject will show; Ohio R. R. Com. v. Hocking Valley Ry., 12 I. C. C., 398; Traer v. Chic. & Alt. R. R., 13 I. C. C., 451; Hillsdale Co. vs. Pa. R. R., 19 I. C. C., 356; Minds vs. Pa. R. R., 20 I. C. C., 52.

The basis of the Commission's orders is certain findings of fact concerning the capacity at which the mine should be rated; the number of working days that should constitute an average working month; the number of additional tons that the Coal Co. could and would have mined, sold, and shipped, during the whole 5 years, if the mine had received its proper share of cars; the amount of profit that would have been made on the estimated additional tonnage; the actual cost of mining per ton; and the estimated cost if the mine had received its proper share of cars. In the district court, the Coal Co. offered the evidence of several witnesses in addition to the findings and orders. The Railroad did not, and does not, dispute the findings except in two particulars; (*a*) It denies that the Coal Co. could have mined coal at a cost of 88 cents per ton, even if the proper share of cars had been furnished; and (*b*) It disputes the estimate of additional tonnage that the Coal Co. would have mined and shipped during the second period, if such share had been received.

As to the first particular, the Railroad insists, that the Coal Co. could not possibly escape two items of cost, namely, the mine rate of wages and the royalty, and that, even if nothing else than these items were charged against the additional tonnage, the cost of mining both the coal that was actually brought to the surface, and the estimated additional coal, would necessarily have been more than 88 cents, the cost found by the Commission. And, in further reference to the cost of mining during the second period, the Railroad insists that the inevitable cost would have embraced two other items in addition to the mine rate of wages and the royalty. To the Railroad's evidence concerning this first particular, the Coal Co. offered some evidence in reply, and thereupon the Railroad asked for instructions whose refusal is assigned for error.

The other particular referred to relates to the second period only. The Railroad contends, that when the Commission estimated the additional tonnage that could and would have been mined and shipped if the Coal Co. had received its proper share of cars, they disregarded their own rule of distribution. This contention bears directly upon the present controversy, because the amount of the Coal Co.'s damage depends largely on the number of cars it should have received. It would have made profits if it had been able to ship, and it could have shipped if it had received the cars, so that the Railroad's failure to furnish the cars bears directly on the question of damage. The Railroad's argument is, that in substance the Commission's rule provides as follows: The capacity of each mine in the district is to be rated by adding the tons it could produce (its physical capacity), and the average number of tons it could sell (its commercial capacity), and dividing the sum by two—the capacity or rating thus

ascertained being the basis on which cars are to be apportioned during percentage periods. The first step in determining the number of cars to be allotted to each mine during such periods is to determine the proportion that would normally go to the mine. This is obtained by taking the aggregate ratings of all the mines in the district and fixing the proportion that each rating bears to the aggregate. The next step is to determine how many cars are available, and in so doing all the cars in the four classes described below are to be put into one pool. Whenever there are cars enough to carry all the coal produced, no question of diminishing the number for each mine arises; but during percentage periods the question does arise continually, for under the Commission's rule the three classes of "assigned" cars must first be allotted to the mines that have a prior right thereto, and this allotment inevitably compels a readjustment of the "unassigned" or "system" cars that each mine is to receive. There are 4 classes of coal cars; (1) individual or private cars, owned or leased by a shipper, (2) cars intended to carry fuel for the Penna. Railroad itself, (3) cars sent by foreign railroads intended to carry their own fuel supply, and (4) other cars furnished by the Railroad for general commercial use. The first three classes are "assigned" cars, and the cars in the fourth class are "Unassigned" or "system" cars. The rule requires that the assigned cars shall first be given to such mines as may be designated either by the owners or lessees of the private cars, or by the respective railroads; and requires that these 3 classes shall be thus allotted in the first instance, without regarding the number of cars to which the particular mine might be entitled if its rating alone were considered—the result being,—that when the system cars come to be distributed, they cannot be properly allotted without first taking into account the previous allotment of the assigned cars. For example; if a mine has already received assigned cars, these must be counted against the share to which its rating (if taken alone) would entitle it, so that, if the assigned cars already received equal or exceed the mine's share estimated according to its rating alone, it receives none of the system cars; while on the other hand, if the assigned cars already received are fewer than its rating (if considered alone) would entitle it to receive, the mine does receive some of the system cars, but only so many as will bring the total number up to the rating. On this point, the Railroad contends, that the Commission undoubtedly disregarded its own rule in estimating the additional tonnage that would have been mined and shipped by the Coal Co. during the second period, and has ascertained such tonnage by a different and incorrect method.

The Railroad complains also about the damages recovered as interest by the plaintiffs, its position being this: Minds as surviving partner claimed about $80,000, and was awarded only about $18,600; Minds and Julia Matz claimed about $75,000, and were awarded only about $31,700; each sum to bear interest from June 28, 1907. The Railroad objects to the Commission's allowance of interest, and also to any allowance of interest in the district court, on the ground that the findings and orders of the Commission and the evidence offered

at the trial show clearly that the plaintiffs' demands were grossly and unfairly inflated.

Finally, after the trial, counsel fees were asked for and allowed; and these are now objected to as excessive, and also as without legal warrant, the second objection being put on the ground that the fees should have been confined to the services of counsel in connection with the suits in the district court.

(1) The Railroad complains, but we think without sufficient warrant, that the trial judge erred in what he said to the jury in submitting the question, how much the cost of mining would have been if the plaintiffs had received their proper share of cars. We think his instructions were sufficient, and see no occasion to discuss them. Moreover, on this subject the evidence was conflicting, and, since the credibility of opposing testimony was involved, the Railroad was not entitled to binding instructions. The verdict on this point must be accepted as final.

(2) The next matter concerns the second period only, and presents the objection on which the Railroad seems to lay most weight, namely, that in making the orders of reparation the Commission followed, not its own, but another, rule of distribution. In this respect the Railroad contends that the situation is very much like the situation in Railroad vs. Jacoby, 242 U. S., —, and indeed is controlled by that decision. In our opinion, an important difference exists for the following reasons:

Before the Commission the Jacoby case and the case now in hand were considered in the same group, and both cases attacked the Railroad's rule of distribution on the ground of discrimination. When the Jacoby case came to be tried in the district court, the plaintiff offered no other evidence than the Commission's order, whereupon the Railroad offered tables showing in detail that during the period then in question certain favored companies had received cars amounting to 59.9 and 59.6 per cent. of their ratings. Jacoby had received a much smaller percentage, and the relevancy of the tables was, not so much to prove the discrimination as to show in connection with other evidence that the Commission had calculated Jacoby's damages by using precisely the same percentages, and had thus permitted recovery (as the Supreme Court said):

"* * * not upon the basis of damages sustained by reason of the illegal discrimination practiced against the plaintiffs as found by the Commission, but upon the basis that (Jacoby was) entitled to receive cars equal in ratio to those illegally and preferentially given to the certain favored companies named in the tables. The effect of the enforcement of such rule, would be, not to give the shipper the damages which he actually suffered, but would base the recovery upon a rule which is condemned as to others, because of its discrimination in their favor,—a result manifestly not intended by the act of Congress."

In the district court Jacoby recovered the amount thus improperly awarded by the Commission, with interest thereon, and the Supreme Court held that such a result was wrong; and that the jury

should have been instructed, that, if the Commission's award was in fact based on the proposition that Jacoby also was entitled to cars amounting to 59.9 and 59.6 per cent., the award was erroneous and the plaintiff should not have recovered. The supreme court said:

"It is urged that the testimony before the Commission is not all in the record, and that for aught that appears the Commission may have reached its conclusion and awarded damages upon other and competent proofs, and it is insisted that the coincidence of the amount as awarded and the amount ascertained by the use of the percentages contained in the tables may not necessarily have controlled the action of the Commission. But it is difficult to reach the conclusion that the Commission could have arrived at the result so exactly corresponding with the one obtained by the use of the percentage, shown in the tables, except by actually using them to ascertain the sum which is exactly the amounts resulting from their application. The Commission might have approximated the same result by using other and legal means to ascertain the damages sustained, but when it is demonstrated that the use of the percentages precisely produces the amount awarded to the dollar and cent, it seems almost mathematically certain that the result could have been reached in no other way. At least, we think that the testimony was in such shape that, as we have already said, the Company was entitled to the specific request upon this subject submitting the matter to the jury."

In some respects the case now in hand is like Jacoby's case, but it differs in what we regard as a material particular. Laying aside the fact that the present plaintiffs offered other evidence than the Commission's findings and orders, we think it important to observe that the principal of each verdict is for a sum considerably less than the principal of the Commission's award, so that the recovery here does not rest on the award alone, but is undoubtedly based on all the evidence touching the subject of the plaintiffs' damage. As an award by the Commission is only prima facie evidence of the amount of damage, it follows that on the trial in the district court the Railroad may attack the amount, and if the evidence show that the award is incorrect the jury should follow the evidence and reject the award. We do not decide the question, whether a plaintiff can recover more than the Commission awards, but undoubtedly the Railroad may prove that the sum is too large. As the verdicts here demonstrate, the jury did not follow the orders of the commission. and it seems to us therefore, that, even if the awards be calculated on the wrong theory, the plaintiffs have not recovered on this heory, but on other evidence, and are not to be charged with the Commission's possible mistake. In the Jacoby case the jury repeated the Commission's mistake precisely, and in this respect the case before us appears to be materially different, for the jury here has rejected the Commission's calculation, and has reached a different result.

We have considered the Railroad's position at some length in order to present it to the Supreme Court if the case should be re-

viewed by that tribunal, but in our opinion the question is not before us on this record for the following reason: The district judge gave to the jury a clear and painstaking explanation of the questions submi ted, and in general terms he instructed them about the proper method of distributing cars; but, no doubt by inadvertence (as he himself has stated in 237 Fed. on page 272), he did not call their attention in detail to some of the evidence, particularly to a table or blue print that was regarded by the Railroad as of much importance. Some of the Railroad's requests for charge were based on this table, and indeed the argument of counsel in this court rested in large measure thereon. At the end of the charge the trial judge said:

"I think I have gone over the subject-ma'ter of all of the different points submitted to me. So far as they are affirmed in the general charge they are affirmed, and so far as not affirmed in the general charge they are disaffirmed, and counsel if they choose may call my attention to any specific point which they would like to have specifically answered."

This was a plain request to counsel to call his attention to any omission, and in fairness to him should have been then complied with. But he was not asked to answer specifically any of the Railroad's points. On the contrary, counsel replied as follows:

"In the first period we do not dispute the lost tonnage nor the cost. In the second period we dispute the correctness both of plaintiff's cost figures and also the tonnage. We ask that the court so charge."

The court immediately complied with this request, whereupon each party sent out its own calculation and the amount due in order to save the jury from labor. As it seems to us, the Railroad should not now be allowed to complain, as it does complain by several assignments of error, that some of its requests for instruction were not given. The situation is dealt with so well in Thompson v. Lumber Co., 55 Pa. Super. 327, that we content ourselves by repeating what was said in that case by President Judge Rice:

"The charge as a whole was a clear, comprehensive, and impartial presentation of the issues of fact to be decided, and if there was omission to call attention to, or comment upon as fully as might be deemed desirable, specific facts or phases of the evidence, it was an inadvertency, which, if the judge's attention had been called to it, doubtless would have been corrected. The decisions are numerous, and are founded on just principles essential to the avoidance of undue expense and delay in the adjudication of cases, that inadvertent mistakes or omissions in reviewing the testimony should be called to the attention of the court before the case goes to the jury, so that the error, if there is one, may be corrected before it has done any harm. As to such inadvertent omission or mistake, it has been said, and we think the principle is applicable to these assignments, that 'a party may not sit silent and take

his chance of a verdict, and then if it is adverse complain of a matter which, if an error, would have been immediately rectified and made harmless.' Com. v. Razmus, 210 Pa. 609; Com. v. Minney, 216 Pa. 149; Medis v. Bentley, 216 Pa. 324; Slavin v. Northern Cambria Street Railway Co., 47 Pa., Superior Ct. 454; Com. v. Eaby, 52 Superior Ct. 619."

(3) With regard to the allowance of damages for delay in the form of interest, we find no error to correct. Altho such an allowance in actions of tort is not a matter of right, it is nevertheless permissible and often forms part of a verdict. On the facts of this case we cannot say that no allowance should have been made: the only ground of the objection is the difference between the amount originally claimed before the Commission and the amount finally adjudged to be due, and this difference is not of itself sufficient to require us to decide as a ma ter of law that the plaintiff's original claims were unduly inflated or made in bad faith. Besides, if the subject should be within our power on this record, the amount of this allowance, whether by the commission or by the jury, does not seem to us excessive, and we see no reason on this account to interfere with the verdict.

(4) As to the award of counsel fees, we are similarly uncertain. We accept the statement of the trial judge that he confined himself to compensation for services in the district court, and, as we do not know what facts he had before him, we are unable to say that any abuse of discretion appears from the mere amount of his award.

In each case the judgment is affirmed.

Endorsed: No. 2195. Opinion of the Court by McPherson, J. Received and filed July 19, 1917. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2195 (List No. 17).

PENNA. RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES H. MINDS, etc., Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by

this Court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs.

(Signed) JOHN B. McPHERSON,
Circuit Judge.

Philadelphia, July 19, 1917.

Endorsed: No. 2195. Order Affirming Judgment. Received and filed July 19, 1917. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2195.

PENNSYLVANIA RAILROAD CO., Plaintiff in Error,

vs.

JAMES H. MINDS, etc., Defendant in Error.

And afterwards, to wit, on the seventeenth day of September, 1917, a petition for re-argument or modification of the Court's opinion was duly filed, whereupon the Court made the following order:

And now, to wit, October 8, 1917, after due consideration, the petition for re-argument or modification of the court's opinion in the above-entitled case is hereby refused.

(Signed) PER CURIAM.

Received and filed Oct. 8, 1917. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2195.

THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES H. MINDS and JULIA A. MATZ, Copartners, Trading as BULAH COAL COMPANY, Defendants in Error.

Specifications of Error.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

Now comes the plaintiff in error, The Pennsylvania Railroad Company, by Henry Wolf Bikle and Francis I. Gowen, its Attorneys, and says that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Third Circuit in the above

entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error in this, to wit:

1. The said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania for thirty-three thousand six hundred and eighteen Dollars and thirty-seven cents ($33,618.37), and costs of suit, entered on the 10th day of November, A. D. 1916, in favor of said defendants in error and against said plaintiff in error.

2. The said Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court for the Eastern District of Pennsylvania and in not remanding the said cause to the said District Court for a new trial.

3. The said Circuit Court of Appeals erred in not sustaining the first assignment of error in the said cause, which assignment was as follows:

"I. The learned trial Judge erred in entering the order made by him on the tenth day of April, 1916, granting leave to the plaintiff to amend the original petition filed in this case, the effect of the amendment thus allowed being to enable the plaintiff to assert a cause of action based upon an order of the Interstate Commerce Commission other than the order on which suit had originally been brought, which substituted order had been made by the Interstate Commerce Commission more than a year prior to the date of the allowance of the amendment."

4. The said Circuit Court of Appeals erred in not sustaining the second assignment of error in the said cause, which assignment was as follows:

"II. The learned trial Judge erred in charging the jury as follows:

'Now, gentlemen, there is another question in this case, and that is this: There is a dispute as to the tonnage between these parties to this extent, and that bears also upon this question of cost, and the defendant presents to you this view of it: They figure up—and I will only give you the round figures instead of going into the actual figures, because they are somewhat confusing, but it will give you the idea—the defendant presents this view of it, that the actual total cost of the tonnage which was put out amounted in round figures to $136,000. If the increased tonnage could have been put out at 88 cents, then the total cost instead of being $136,000 would have been only $105,00-. The defendant, therefore, presents that view to you. Let me see if I can make it clearer by a simpler illustration, and taking small figures, because these large figures are a little confusing. Suppose a man is manufacturing or producing anything, and his total cost for producing it is $123. Now, you inquire how many units of product he has put out, how many anything, no matter what

it is, and you find out he has put one hundred. Now, $123, that it has cost him, divided by one hundred, would give $1.23 per unit, when it has cost him $123 in the aggregate. Now, suppose you increase his units to one hundred and twenty, and you find that according to his calculation that his aggregate cost instead of increasing, as you would naturally expect it to do, in accordance with the increased output, or if it did not increase it would be difficult to understand how it would decrease—and you find that his aggregate cost instead of being $123 has been cut down to $105. You say, 'How can that be? I can easily understand that if a man spends $123. to put out one hundred things his unit cost is $1.23 for each one. That is clear enough. If he only puts out fifty, then his cost for each one is double that. If he puts out two hundred at the same cost, then his cost per unit is half of the $1.23. That is clear enough. But if it costs a man $123 to put one hundred, how can he possibly put out one hundred and twenty for $105?' Your conclusions would be that there was something wrong in the calculation of unit cost. You must have it too low. That is the question for you to determine in this case, because it bears upon both the aggregates of this claim, and bears upon the unit cost, and therefore we have the testimony which has been adduced before you to show that there is an inaccuracy in the claim presented by the plaintiff in that respect. Of course, gentlemen, while as a mathematical proposition that is obviously true, and that mathematically speaking it would be absurd for a man to say that he could produce one hundred things for $123 but if he increased his output to one hundred and twenty, produced twenty more of the same things in the same way, he would cut down his aggregate cost from $123 to $105. But you are to consider the argument addressed to you by counsel upon the other side, and their explanation of that phenomenon. I do not pretend to present all of it to you, but just enough to give you an illustration. Take a man who is shipping coal, for instance, and all his cars come to him in a regular way at the times at which he may employ his men right at once in filling them, getting them out of the way, bringing empties in and filling them and getting them out of the way the result would be that he could get them out at a unit cost of a certain amount per ton, but if he had the men there and their wages going on and all the other expenses going on, and they were standing there idle doing nothing for an hour or two hours or three hours, there were breaks and interruptions in the continuity of his work in the one case, then it would be easily understood that under one condition of work it might cost the man $123 to get out one hundred tons, and under the other more favorable conditions of work he might be able to get out one hundred and twenty tons at an aggregate cost of $105" (R. 299-301).

5. The said Circuit Court of Appeals erred in not sustaining the third assignment of error in the said cause, which assignment was as follows:

"III. The learned trial Judge erred in charging the jury as follows:—

'In other words, you find the damages as you think they were on June 28th, 1907, and then you add to it such sum as in your judgment will make the money received now the equivalent of that received on June 28th, 1907. That must not exceed six per cent. interest' " (R. 302).

6. The said Circuit Court of Appeals erred in not sustaining the sixth assignment of error in the said cause, which assignment was as follows:

"VI. The learned trial Judge erred in refusing to affirm the third point submitted by the defendant, as follows:—

'3. The Interstate Commerce Commission ascertained the number of cars which the plaintiffs, in the judgment of the Commission, should have received in the period of the action with reference to a rule of distribution promulgated by the Commission after the close of the period of the action. The Commission had no power to make its rule of distribution retroactive, and hence its conclusion or finding as to the number of cars that the plaintiffs should have received, and its award of damages based thereon are invalid and afford no basis for a recovery in the present case' " (R. 313).

7. The said Circuit Court of Appeals erred in not sustaining the seventh assignment of error in the said cause, which assignment was as follows:

"VII. The learned trial Judge erred in refusing to affirm the fourth point submitted by the defendant, as follows:

'4. In determining the number of cars to which the plaintiffs were entitled the Interstate Commerce Commission was not at liberty to disregard the rule of distribution which it had itself promulgated, but was required to ascertain such number in accordance with this rule.' " (R. 314.)

8. The said Circuit Court of Appeals erred in not sustaining the eighth assignment of error in the said cause, which assignment was as follows:

"VIII. The learned trial Judge erred in refusing to affirm the fifth point submitted by the defendant, as follows:

'5. Under the rule of distribution prescribed by the Interstate Commerce Commission the plaintiffs were not entitled in the period of the action to any individual cars belonging to other shippers or to any fuel cars either of the defendant or of any other railroad company if these were consigned to other mines. The plaintiffs were entitled to their own individual cars and to their just and proper share of the cars which the defendant had available for distribution among shippers.' (R. 314.)"

9. The said Circuit Court of Appeals erred in not sustaining the ninth assignment of error in the said cause, which assignment was as follows:

"IX. The learned trial Judge erred in refusing to affirm the sixth point submitted by the defendant as follows:

'6. If the testimony has satisfied the jury that the Interstate Commerce Commission in arriving at the number of cars which the plaintiffs should have received ascertained this number by treating as justly allotable to them the percentage which their mine rating entitled them to of the aggregate of all the cars which were placed by the defendant at the mines in the region in which the plaintiffs' mine was located, regardless of the consideration that there were included in this aggregate a large number of individual cars belonging to other shippers, and fuel cars of the defendant and of other railroad companies, which had been placed at other mines, the method adopted by the Commission for ascertaining the number of cars which the plaintiffs should have received was not in accordance with its own rule and was consequently erroneous, and the finding or conclusion of the Commission as to the number which the plaintiffs should have received was therefore invalid and affords no basis for a recovery in the present action.' (R. 314.)"

10. The said Circuit Court of Appeals erred in not sustaining the tenth assignment of error in the said cause, which assignment was as follows:

"X. The learned trial Judge erred in refusing to affirm the seventh point submitted by the defendant, as follows:

'7. It appears from the evidence that in arriving at the number of additional cars which, in its judgment, the plaintiffs should have received, the Interstate Commerce Commission failed to give effect in certain periods to the rule of the defendant in force at the time and approved by the Commission by which cars placed at mines were counted as part of the mine's quota on each day on which they were available for shipments. This rule was a lawful and proper one, and the Commission was not justified in ignoring or disregarding it.' (R. 315.)"

11. The said Circuit Court of Appeals erred in not sustaining the eleventh assignment of error in the said cause, which assignment was as follows:

"XI. The learned trial Judge erred in refusing to affirm the defendant's eighth point as *follows:*

'8. The defendant has submitted a statement prepared by a public accountant, purporting to show the number of cars which the plaintiffs would have received if distribution had been made by the defendant in accordance with the rule of the Interstate Commerce Commission. It appears from this statement that the additional cars to which they would have been entitled would not have exceeded 739 cars. Treating each car as having a capacity of thirty-five tons, the tonnage which could have been transported in these cars would have been 25,865 tons, and this tonnage should be accepted by the jury as representing that which the plaintiffs should have received cars for the shipment of, if the jury believe that the statement prepared by the accountant correctly shows the number of cars which, under the Commission's rule of distribution, plaintiffs were entitled to re-

ceive in addition to those which were actually delivered to them." (R. 315.)

12. The said Circuit Court of Appeals erred in not sustaining the twelfth assignment of error in the said cause, which assignment was as follows:

"XII. The learned trial Judge erred in refusing to affirm the eleventh point submitted by the defendant, as follows:

'11. The evidence adduced upon behalf of the defendant has shown that if the plaintiffs had mined any additional tons in the period of the action, they would have been obliged to pay or expend for each ton, the miners' wages, which would have been 63 cents a ton, and the royalty on the coal mined, which would have been not less than ten cents a ton, and that if they had mined 71,257 tons, there would have been additional expenses of 7 cents per ton on account of ventilation and supplies, and 6 cents per ton on account of transporation, making a total additional expense of 86 cents per ton. If the jury believe this testimony as to this additional cost, the cost per ton of the coal mined including these 71,257 additional tons, would have been $1.00.' (R. 316.)"

13. The said Circuit Court of Appeals erred in not sustaining the thirteenth assignment of error in the said cause, which assignment was as follows:

"XIII. The learned trial Judge erred in refusing to affirm the twelfth point submitted by the defendant, as follows:

'12. The evidence has shown that if the plaintiffs had mined any additional tons in the period of the action, they would have been obliged to pay or expend for each ton, the miners' wages, which would have been 63 cents a ton, and the royalty on the coal mined which would have been not less than 10 cents a ton. The additional cost that the plaintiffs would have been subjected to, therefore, had they mined any additional tonnage would have been not less than 73 cents per ton. If the jury believe this testimony as to this additional cost, and there is nothing to contradict it, the cost per ton if 25,865 tons had been mined would have been $1,026.' (R. 316.)"

14. The said Circuit Court of Appeals erred in not sustaining the fourteenth assignment of error in the said cause, which assignment was as follows:

"XIV. The learned trial Judge erred in refusing to affirm the sixteenth point submitted by the defendant, as follows:

'16. The plaintiffs are not entitled to recover interest on the amount of the award from June 28th, 1907, to the date on which the award was made.' (R. 317.)"

15. The said Circuit Court of Appeals erred in not sustaining the fifteenth assignment of error in the said cause, which assignment was as follows:

"XV. The learned trial Judge erred in refusing to affirm the seventeenth point submitted by the defendant, as follows:

'17. The plaintiffs are not entitled to recover interest on the amount of the award from the date on which the award was made.' (R. 318.)"

16. The said Circuit Court of Appeals erred in not sustaining the sixteenth assignment of error in the said cause, which assignment was as follows:

"XVI. The learned trial Judge erred in refusing to affirm the eighteenth point submitted by the defendant, as follows:

"18. Under the law and the evidence the plaintiffs are not entitled to recover and your verdict should be for the defendant." (R. 318.)

17. The said Circuit Court of Appeals erred in not sustaining the seventeenth assignment of error in the said cause, which assignment was as follows:

"XVII. The learned trial Judge erred in entering judgment in favor of the plaintiffs against the defendant upon the verdict of the jury."

18. The said Circuit Court of Appeals erred in not sustaining the eighteenth assignment of error in the said cause, which assignment was as follows:

"XVIII. The learned trial Judge erred in allowing a counsel fee of $6,750, since such counsel fee was excessive."

19. The said Circuit Court of Appeals erred in not sustaining the nineteenth assignment of error in the said cause, which assignment was as follows:

"XIX. The learned trial Judge erred in allowing a counsel fee of $6,750, since such a fee was made with reference to services of counsel before the Interstate Commerce Commission as well as in connection with the institution and prosecution of the present action in the District Court."

20. The said Circuit Court of Appeals erred in not sustaining the twentieth assignment of error in the said cause, which assignment was as follows:

"XX. The learned trial Judge erred in allowing a counsel fee of $6,750, since such fee was not restricted to the services of counsel rendered in connection with the initiation and prosecution of the case in the District Court."

Wherefore, the said, The Pennsylvania Railroad Company, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the plaintiff in error the said judgment of the said United States Circuit Court of Appeals be reversed, annulled, and for naught esteemed, and the said cause be remanded to the United States District Court for the East-

rn District of Pennsylvania, with instructions to grant a new trial n said cause, or for such further proceedings in said cause as may be letermined upon by the Supreme Court, to the end that justice may e done in the premises.

THE PENNSYLVANIA RAILROAD COMPANY,
By HENRY WOLF BIKLE,
FRANCIS I. GOWEN,
Attorneys for Plaintiff in Error.

October 11th, 1917.

Endorsed: No. 2195. Specifications of Error. Received and filed Oct. 12, 1917. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2195.

THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES H. MINDS and JULIA A. MATZ, Co-partners, Trading as BULAH COAL COMPANY, Defendants in Error.

Petition for Writ of Error.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit.

Your petitioner, The Pennsylvania Railroad Company, Plaintiff in Error, in the above-entitled cause, respectfully shows that the above-entitled cause is now pending in this Court, and that a judgment has therein been rendered on the 19th day of July, A. D. 1917, affirming a judgment of the District Court of the United States for the Eastern District of Pennsylvania in favor of the defendants in error and against the plaintiff in error, and that the matter in controversy in said suit exceeds one thousand dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in anywise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different states, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and it is not an admiralty case, but that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; therefore your petitioner would respectfully pray that a writ of error be allowed it in the above entitled cause directing the clerk of this Court to send the record and proceedings in said cause with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the specification

of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

THE PENNSYLVANIA RAILROAD COMPANY,
(Signed) By HENRY WOLF BIKLE,
FRANCIS I. GOWEN,
Its Attorneys H. W. B.

October 11, 1917.

Endorsed: Petition for Writ of Error. Received and filed Oct. 12, 1917. Saunders Lewis, Jr., Clerk.

The foregoing petition is granted and writ of error allowed as prayed for upon plaintiff's giving bond according to law in the sum of $250.

(Signed) JOHN B. McPHERSON,
Circuit Judge.

October 16, 1917.

Endorsed: No 2194. Order Allowing Writ of Error. Received and filed October 16, 1917. Saunders Lewis, Jr., Clerk.

Bond.

Know all men by these presents, That we, The Pennsylvania Railroad Company, as principal, and United States Guarantee Company, as sureties, are held and firmly bound unto James H. Minds and Julia A. Matz, trading as Bulah Coal Company, hereinafter called Obligee in the full and just sum of Two hundred and fifty dollars ($250) to be paid to the said James H. Minds and Julia A. Matz trading as Bulah Coal Company, their certain attorney, executor, administrators, or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and several-y, by these presents. Sealed with our seals and dated this 17th day of October, in the year of our Lord one thousand nine hundred and seventeen.

Whereas, lately at a session of the United States District Court for the Eastern District of Pennsylvania, in a suit depending in said court between the said James H. Minds and Julia A. Matz, trading as Bulah Coal Company, and The Pennsylvania Railroad Company, a judgment was rendered against the said The Pennsylvania Railroad Company and in favor of the said James H. Minds and Julia A. Matz trading as Bulah Coal Company in the sum of $33,618.37, which judgment was on appeal to the United States Circuit Court of Appeals for the Third Circuit affirmed on the 19th day of July, 1917, and the said The Pennsylvania Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said James H. Minds and

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Julia A. Matz trading as Bulah Coal Company, citing and admonishing them to be and appear at the Supreme Court of the United States, to be holden at the city of Washington within thirty days.

Now the condition of the above obligation is such, That if the said the Pennsylvania Railroad Company, shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of

(Seal of the Company.)

THE PENNSYLVANIA RAILROAD COMPANY,
By W. H. MYERS, [SEAL.]
Vice President.

HENRY WOLF BIKLÉ,
Witness as to P. R. R. Co.

Attest:
ROB'T H. GROFF, [SEAL.]
Ass't Secretary.

[Seal of the Company.]

UNITED STATES GUARANTEE COMPANY. [SEAL.]

[Seal of the Company.]

WILLIAM H. JACKSON,
Att'y in Fact.
EDWARD H. DE BAECKE,
Att'y in Fact.

A. THOMPSON,
Witness as to Surety.

Endorsed: No. 2195. Bond on Writ of Error for Supreme Court Received and filed Oct. 18, 1917. Saunders Lewis, Jr., Clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court in the case of Pennsylvania Railroad Company, Plaintiff in Error, vs. James H. Minds, and Julia A. Matz, co-partners, trading as Bulah Coal Co., Defendants in Error, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this twenty-third

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day of October in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States the one hundred and forty-second.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

In the United States Circuit Court of Appeals for the Third Circuit.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between the Pennsylvania Railroad Company, and James H. Minds and Julia A. Matz, co-partners, trading as Bulah Coal Company, a manifest error hath happened, to the great damage of the said Pennsylvania Railroad Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eighteenth day of October, in the year of our Lord one thousand nine hundred and seventeen.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk United States Circuit Court of Appeals for the Third Circuit.

Allowed by—
JOHN B. McPHERSON,
Circuit Judge.

UNITED STATES OF AMERICA, *ss:*

To James H. Minds and Julia A. Matz, Co-partners, Trading as Bulah Coal Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the

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Clerk's office of the United States Circuit Court of Appeals for the Third Circuit, wherein the Pennsylvania Railroad Company is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this eighteenth day of October, in the year of our Lord one thousand nine hundred and seventeen.

[Seal United States Circuit Court of Appeals, Third Circuit.]

JOHN B. McPHERSON,
Circuit Judge.

Service of this citation is accepted on behalf of the defendants in error.

H. W. MOORE,
Counsel for Defendants in Error.

October 19th, 1917.

[Endorsed:] 2195. Citation.

Endorsed on cover: File No. 26,216. U. S. Circuit Court Appeals, 3d Circuit. Term No. 749. Pennsylvania Railroad Company, plaintiff in error, vs. James H. Minds and Julia A. Matz, trading as Bulah Coal Company. Filed October 26th, 1917. File No. 26,216.

-3-

Office Supreme Court, U.
FILED
MAR 20 1919
JAMES D. MAHER,
CLERK

Nos. 293 & 294. OCTOBER TERM, 1918.

IN THE

Supreme Court of the United States

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES H. MINDS, Surviving and Liquidating Partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company.

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES H. MINDS and JULIA C. MATZ, trading as Bulah Coal Company.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

HENRY WOLF BIKLÉ,
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1918. NOS. 293 AND 294.

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

James H. Minds, Surviving and Liquidating Partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company.

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

James H. Minds and Julia C. Matz, trading as Bulah Coal Company.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The two cases presented to the Court on these writs of error had their inception in two proceedings initiated before the Interstate Commerce Commission to recover damages claimed to have been sustained on account of an alleged improper distribution of coal cars by The Pennsylvania Railroad Company during the years 1902 to 1907. An award of reparation was made in each instance by the Commission, and these awards not having been paid by the railroad, suits were begun in the District Court of the United States for the Eastern District of Pennsylvania. These suits, which were tried together, eventuated in each instance in a verdict for a sum somewhat less than the amount awarded by the Commission. The cases were then taken by writ of error to the Circuit Court of Appeals for the Third Circuit, where again they were argued and disposed of together, the judgments below being affirmed. (Pennsylvania Railroad Co. *vs.* Minds, 244 Fed. 53, 1917.) From these judgments the cases have been brought by writ of error to this Court, where it seems appropriate to consider them together as they were considered in the Circuit Court of Appeals, since the issues are in a large measure identical, as are also the records.

The facts involved are briefly as follows:—

In June 1902, James H. Minds, the defendant in error in case No. 293 was in partnership with one William J. Matz, and under the name of the Bulah Coal Company operated a mine known as Webster No. 4, which was located in Clearfield County, Pennsylvania, adjacent to the railroad of the plaintiff in error, by which coal produced therefrom was shipped to market. William J. Matz died in April, 1904, and James H. Minds as the surviving partner continued to operate the mine until October, 1904, on which date he entered into a partnership with Julia A. Matz, the widow of William J. Matz, and with her continued to operate the mine under the name of Bulah Coal Company up to and including June 1907.

In the period from June, 1902, to June, 1907, the plaintiff in error had made a pro rata or percentage distribution of its cars among the mines located on its railroad, this being necessary because the aggregate shipping capacity of the mines exceeded the cars available for shipment therefrom and this system of distribution was in effect in the so-called "Tyrone Region" of the railroad in which the mine of the defendants in error was located.

The defendants in error, conceiving that they had not received the number of cars to which under a proper system of distribution they would have been entitled, in the latter part of June, 1907, instituted two proceedings before the Interstate Commerce Commission. One of these proceedings was instituted by James H. Minds as the surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as the Bulah Coal Company, and related to the period extending from June, 1902, to and including September, 1904, and in this proceeding damages in the sum of $80,174.60 were claimed. This proceeding eventuated in an order entered by the Interstate Commerce Commission under date of March 11th, 1912, awarding to the complainant the sum of $18,591.48, with interest at 6 per cent. from June 28th, 1907 (Transcript of Record, No. 293, page 28).

The other of these proceedings was instituted by James H. Minds and Julia A. Matz, trading as the Bulah Coal Company, and related to the period extending from October 1st, 1904, to June 30th, 1907, the damages claimed being the sum of $75,226.99. This proceeding eventuated in an order entered by the Interstate Commerce Commission under date of March 11th, 1912, awarding to the complainant the sum of $31,715.57, with interest from June 28th, 1907 (Transcript of Record, No. 294, page 28).

The plaintiff in error, having failed to pay either of the awards made by the Commission, separate actions thereon were brought by the defendants in error.

In the first of these actions, to wit, that brought in the United States District Court for the Eastern District of

Pennsylvania, by James H. Minds, the surviving and liquidating partner of James H. Minds and William J. Matz lately trading as Bulah Coal Company, to No. 2422 of December Term, 1912 (No. 293 in this Court), the said James H. Minds alleged as his cause of action the order entered by the Interstate Commerce Commission in favor of James H. Minds and Julia A. Matz; and in the second of these actions, to wit, that brought in the United States District Court for the Eastern District of Pennsylvania, by James H. Minds and Julia A. Matz, to No. 2424, of December Term, 1912 (No. 294 in this Court), the said James H. Minds and Julia A. Matz alleged as their cause of action the order entered by the Interstate Commerce Commission in favor of James H. Minds, the surviving and liquidating partner of James H. Minds and William J. Matz.

Subsequently, to wit, on April 5th, 1916, a petition was filed by the plaintiffs respectively asking leave to amend their original petitions so as to substitute in each case as the basis of action the order entered by the Interstate Commerce Commission in favor of the plaintiff in the action. To these petitions, answers were duly filed by the Railroad Company, the plaintiff in error here, pointing out that in each instance the award for the recovery of which the proceeding was brought was not made in favor of the plaintiff, and that the purpose of the plaintiff's petition was to permit the plaintiff to so amend the original petition as to substitute for the order actually sued upon another order made more than a year prior to the filing of the petition for leave to amend. This, it was insisted was in contravention of the provisions of the Act to Regulate Commerce, which require that a petition for the enforcement of an order of the Interstate Commerce Commission for the payment of money shall be filed within one year from the date of the order *and not after*.

The Court, however, permitted in each case the filing of an amended petition and its action in this regard constitutes the basis for the third specification of error in each of these cases.

In the proceedings before the Interstate Commerce Commission inquiry was made as well with respect to the method of distribution pursued by the railroad as with respect to the actual allotment of cars to the defendants in error. In its first or main report the Commission determined what method of distribution should have been followed, and in a supplemental report found that the defendants in error had received in the period of the action fewer cars than they would have received had this method been pursued and determined the amount of the resultant damage to the defendants in error.

In both proceedings the Commission found that the defendants in error would have received, had the system of distribution approved by the Commission been followed, a larger number of cars than they had received under the system followed by the plaintiff in error. According to the Commission's finding defendants in error should have received additional cars which would have enabled them to ship in the earlier period 9523.68 tons and in the later period 71,257.12 tons in addition to the tonnage which was shipped.

This finding of the Commission as to the earlier period has not been and is not controverted by the plaintiff in error. The finding as to the later period is controverted and is made the subject of specifications of error Nos. 7 to 12 inclusive in case No. 294.

The Commission found that if the additional cars had been received, the cost to the defendants in error of mining their coal would have been 88 cents per ton during both periods instead of $1.23 and $1.08, the actual cost, respectively, in the two periods, and the damages which were awarded defendants in error were ascertained upon the basis of this assumed cost.

The finding of the Commission that the defendants in error, had they received the additional cars, would have been enabled to produce and ship coal at a cost of 88 cents per ton was controverted by the plaintiff in error, which contended and still contends that this finding of the Com-

mission was not only unsupported by the testimony, but was directly at variance with that adduced.

The two proceedings in question were heard and disposed of by the Commission in conjunction with three other proceedings of a like character. One of the proceedings thus grouped was that of Jacoby & Co. *vs.* The Pennsylvania Railroad Company, in which an award was made by the Commission, the validity of which finally came before this Court in the case of Pennsylvania Railroad Company *vs.* Jacoby & Co., which is reported in 242 U. S., page 89; and the contention of the plaintiff in error has been and is that the principles settled by this Court in that case invalidates for evidential purposes the findings of the Commission in the second of these cases as to the number of cars which the defendants in error should have received in the later period, and its findings in both as to the assumed cost of mining and shipping coal, had the larger number of cars been furnished to the defendants in error.

The system of distribution approved by the Commission is set forth in the report which will be found at page 235 of the Transcript of Record in No. 293. This report is entitled in the case of the Hillsdale Coal & Coke Company against the Pennsylvania Railroad Company, but, as the report shows, it was intended to be applicable to all the cases embraced in the group, of which the Hillsdale was one.

By this report previous rulings of the Commission were reaffirmed and made applicable to the distribution of cars on the line of the plaintiff in error, which rulings had been to the effect that the owners of private cars were entitled to their exclusive use, and that regardless of the consideration that thereby the mines receiving these cars would receive more than their ratable proportion of all cars available; the owners of private cars were entitled to their exclusive use, and that the owners of mines to which fuel cars were assigned, whether these belonged to the plaintiff in error or to some foreign railroad company, were also entitled to have these cars delivered to them, but that all the private and fuel cars thus placed or delivered

must be counted as cars received by the mines at which they were placed in determining the pro rata allotment to which these mines were entitled of the remaining classes of cars which were available for distribution, these being all cars other than the private and fuel cars.

The Commission refused to disapprove the system of rating the mines established by the railroad (Transcript of Record in No. 293, pages 240 to 244); the rating being determined with reference to the capacity of the mines to produce and dispose of coal and constituting the *basis* upon which cars are allotted to the mines in periods of car shortage.

Having thus determined the system of distribution which should have been followed by the plaintiff in error, the Commission then proceeded in all of the cases comprised in the group to determine what additional cars each of the complainants, including the defendants in error, would have received had its approved system of distribution been followed, and these cars were dealt with in supplemental reports filed by the Commission.

As already stated, the Commission's finding was that in the later of the two periods embraced in the present cases, the defendants in error should have received cars having a loading capacity of 71,257.12 tons. But the Commission did not specifically indicate how it had arrived at this conclusion.

On the trial of the case, with the view of establishing how this figure of 71,257.12 tons had been arrived at, the plaintiff in error introduced a statement which had been compiled by the defendant in error from the records of the plaintiff in error, known as its car distribution sheets and which had been put in evidence before the Commission, from which it appeared that if in the later period the defendant in error had received its pro rata share based upon its mine rating as determined by the Commission of all cars, private, fuel and others, which had been placed by the plaintiff in error in the regions in which its mines were located in this period, it would have received cars equal

to a capacity of the exact tonnage, viz., 71,257.12 tons, which the Commission had found to have been the defendant in error's shortage in cars. The statement in question will be found at page 231 of the Transcript of Record, in No. 293, and the testimony which establishes the exact correspondence between the Commission's finding and the shortage established by this statement, based upon an allocation or allotment to the defendant in error of its share of all the cars and not merely of those which were distributed under the Commission's system of distribution, will be found beginning at page 129 of the same Transcript of Record: (*v. infra*, page 37).

The Commission's finding with respect to the question of the cost at which the coal could have been mined and shipped by the defendants in error in the two periods involved a mathematical absurdity. The Commission found in the first period that the cost of mining the coal which had been produced was $1.23 a ton, and as the tonnage mined in this period had aggregated 110,892 tons, the total cost was $125,397.16, and it further found that if 9523.68 additional tons had been mined, the cost per ton for the entire output would have been 88 cents. By applying this 88 cents to the total increased output, viz., 120,415.68 tons, it will be seen that based upon the Commission's finding of a cost of 88 cents, the increased output would have been produced at actually less outlay than that required for the production of the tonnage actually produced, and this notwithstanding the fact that it was conceded that the defendants in error would have been obliged to pay not less than 73 cents per ton on account of miners' wages and royalty on the 9523.68 additional tons had these been mined.

In the later or second period the actual cost of producing the coal which had been mined was $1.08, and the assumed reduction, therefore, from the actual to the theoretical cost of 88 cents was not so great, but in this period also the finding of the Commission involved, although to a lesser extent, the same mathematical absurdity as did its finding of theoretical cost in the earlier period.

In its award to James H. Minds, the surviving and liquidating partner of James H. Minds and William J. Matz, the Interstate Commerce Commission allowed $18,591.48, whereas Minds had claimed $80,174.60; and in the award to James H. Minds and Julia A. Matz, the Commission allowed $31,715.99, whereas these complainants had claimed $75,226.99; and in making these awards, the Commission also allowed interest from June 28th, 1907. In the District Court, the allowance of interest was objected to as was also the allowance of any interest on account of the cause of action alleged in plaintiff's petition, since the finding of the Commission and also the evidence in the case showed clearly the inflated nature of the demand of the defendants in error. The failure of the Court to rule in accordance with the requests made in this regard constitutes the fourth point which the plaintiff in error desires to argue. In case No. 293 the point is covered by Specifications of Error Nos. 5, 8, and 9. In case No. 294 the point is covered by Specifications of Error Nos. 5, 14 and 15.

After the trial of the case, counsel for the defendants in error asked that counsel fees be awarded, and in case No. 293 a counsel fee of $3250 was allowed and in case No. 294 a counsel fee of $6750 was allowed. The plaintiff in error believes these fees were excessive and also without legal warrant, since they were not restricted to the services of counsel rendered in connection with the initiation and prosecution of the cases in the District Court. This constitutes the final point which the plaintiff in error desires to argue. It is covered by Specifications of Error Nos. 12, 13 and 14 in case No. 293 and by Specifications of Error Nos. 18, 19 and 20 in case No. 294.

In the first case, the jury found a verdict of $16,092.92 in favor of James H. Minds, the surviving and liquidating partner of James H. Minds and William J. Matz.

In the second case, the jury found a verdict of $33,-618.37 in favor of James H. Minds and Julia A. Matz, co-partners trading as Bulah Coal Company.

SPECIFICATIONS OF ERROR.

[CASE No. 293.]

1. The said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania for $16,092.92, and costs of suit, entered on the tenth day of November, A. D. 1916, in favor of said defendant in error and against said plaintiff in error.

2. The said Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court for the Eastern District of Pennsylvania and in not remanding the said cause to the said District Court for a new trial.

3. The said Circuit Court of Appeals erred in not sustaining the first assignment of error in the said cause, which assignment was as follows: —

> "I. The learned trial Judge erred in entering the order made by him on the tenth day of April, 1916, granting leave to the plaintiff to amend the original petition filed in this case, the effect of the amendment thus allowed being to enable the plaintiff to assert a cause of action based upon an order of the Interstate Commerce Commission other than the order on which suit had originally been brought, which substituted order had been made by the Interstate Commerce Commission more than a year prior to the date of the allowance of the amendment."

4. The said Circuit Court of Appeals erred in not sustaining the second assignment of error in the said cause, which assignment was as follows:—

> "II. The learned trial Judge erred in charging the jury as follows:

" 'Now, gentlemen, there is another question in this case, and that is this: There is a dispute as to the tonnage between these parties to this extent, and that bears also upon this question of cost, and the defendant presents to you this view of it: They figure up—and I will only give you the round figures instead of going into the actual figures, because they are somewhat confusing, but it will give you the idea—the defendant presents this view of it, that the actual total cost of the tonnage which was put out amounted in round figures to $136,000. If the increased tonnage could have been put out at 88 cents, then the total cost instead of being $136,000 would have been only $105,000. The defendant, therefore, presents that view to you.

" 'Let me see if I can make it clearer by a simpler illustration, and taking small figures, because these large figures are a little confusing. Suppose a man is manufacturing or producing anything, and his total cost for producing it is $123. Now, you inquire how many units of product he has put out, how many anything, no matter what it is, and you find out he has put one hundred. Now, $123 that it has cost him, divided by one hundred, would give $1.23 per unit, when it has cost him $123 in the aggregate. Now, suppose you increase his units to one hundred and twenty, and you find that according to his calculation that his aggregate cost instead of increasing, as you would naturally expect it to do, in accordance with the increased output, or if it did not increase it would be difficult to understand how it would decrease—and you find that his aggregate cost instead of being $123 has been cut down to $105. You say, "How can that be? I can easily understand that if a man spends $123 to put out one hundred things his unit cost is $1.23 for each one. That is clear enough. If he only puts out fifty then his cost for each one is double that. If he puts out two hundred at the same cost, then his cost per unit, is half of the $1.23. That is clear enough. But if it costs a

man $123 to put out one hundred, how can he possibly put out one hundred and twenty for $105?" Your conclusions would be that there was something wrong in the calculation of unit cost. You must have it too low. That is the question for you to determine in this case, because it bears upon both the aggregate of this claim and bears upon the unit cost, and therefore we have the testimony which has been adduced before you to show that there is an inaccuracy in the claim presented by the plaintiff in that respect. Of course, gentlemen, while as a mathematical proposition that is obviously true, and that mathematically speaking it would be absurd for a man to say that he could produce one hundred things for $123 but if he increased his output to one hundred and twenty, produced twenty more of the same things in the same way, he would cut down his aggregate cost from $123 to $105. But you are to consider the argument addressed to you by counsel upon the other side, and their explanation of that phenomenon. I do not pretend to present all of it to you, but just enough to give you an illustration. Take a man who is shipping coal, for instance, and all his cars come in to him in a regular way at the times at which he may employ his men right at once in filling them, getting them out of the way, bringing empties in and filling them and getting them out of the way, the result would be that he could get them out at a unit cost of a certain amount per ton, but if he had the men there and their wages going on and all the other expenses going on, and they were standing there idle doing nothing for an hour or two hours or three hours, or there were breaks and interruptions in the continuity of his work in the one case, then it would be easily understood that under one condition of work it might cost the man $123 to get out one hundred tons, and under the other more favorable conditions of work he might be able to get out one hundred and twenty tons at an aggregate cost of $105.' "

5. The said Circuit Court of Appeals erred in not sustaining the third assignment of error in the said cause, which assignment was as follows:—

> "III. The learned trial Judge erred in charging the jury as follows:
>
> " 'In other words, you find the damages as you think they were on June 28th, 1907, and then you add to it such sum as in your judgment will make the money received now the equivalent of that received on June 28th, 1907. That must not exceed six per cent. interest.' "

6. The said Circuit Court of Appeals erred in not sustaining the ninth assignment of error in the said cause, which assignment was as follows:—

> "IX. The learned trial Judge erred in refusing to affirm the eleventh point submitted by the defendant, as follows:
>
> " '11. The evidence has shown that if the plaintiffs had mined 9523.68 additional tons they would have been obliged to pay for each ton the miners' wages, which would have been 62 cents a ton prior to April 1st, 1903, and 66 cents a ton thereafter, and a royalty of 10 cents a ton. Upon the basis of an average mining charge for the period of 63 cents a ton, the additional cost that the plaintiffs would have been subjected to had they mined the additional 9523.68 tons would have been 73 cents per ton, and the aggregate cost of mining the additional 9523.68 tons would have been $6952.28. If the jury believe the testimony as to this additional cost, and there is nothing to contradict it, it is mathematically demonstrable that the cost of mining the 120,415.68 tons would have been $1.19 per ton, and this figure should be accepted by the jury in arriving at the plaintiff's damages.' "

7. The said Circuit Court of Appeals erred in not sustaining the tenth assignment or error in the said cause, which assignment was as follows:—

"X. The learned trial Judge erred in refusing to affirm the twelfth point submitted by the defendant, as follows:

" '12. The Commission found, and this finding is not contradicted, and should be consequently accepted by the jury, that the plaintiffs would have realized an average price of $1.598 per ton for the 9523.68 additional tons, and if the jury find that the plaintiffs' average cost of producing the same would have been $1.19 per ton, the difference between these two amounts, viz., 40.8 cents, represents the profit per ton which the plaintiffs failed to realize in the period of the action because of the non-receipt of the cars for the shipment of the 9523.68 additional tons.' "

8. The said Circuit Court of Appeals erred in not sustaining the eleventh assignment of error in the said cause, which assignment was as follows:—

"XI. The learned trial Judge erred in refusing to affirm the sixteenth point submitted by the defendant, as follows:

" '16. The plaintiffs are not entitled to recover interest on the amount of the award from June 28th, 1907, to the date on which the award was made.' "

9. The said Circuit Court of Appeals erred in not sustaining the twelfth assignment of error in the said cause, which assignment was as follows:—

"XII. The learned trial Judge erred in refusing to affirm the seventeenth point submitted by the defendant, as follows:

" '17. The plaintiffs are not entitled to recover interest on the amount of the award from the date on which the award was made.' "

10. The said Circuit Court of Appeals erred in not sustaining the thirteenth assignment of error in the said cause, which assignment was as follows:—

"XIII. The learned trial Judge erred in refusing to affirm the eighteenth point submitted by the defendant, as follows:

"'18. Under the law and the evidence, the plaintiffs are not entitled to recover and your verdict should be for the defendant.'"

11. The said Circuit Court of Appeals erred in not sustaining the fourteenth assignment of error in the said cause, which assignment was as follows:—

"XIV. The learned trial Judge erred in entering judgment in favor of the plaintiffs and against the defendant upon the verdict of the jury.

12. The said Circuit Court of Appeals erred in not sustaining the fifteenth assignment of error in the said cause, which assignment was as follows:—

"XV. The learned trial Judge erred in allowing a counsel fee of $3250, since such counsel fee was excessive."

13. The said Circuit Court of Appeals erred in not sustaining the sixteenth assignment of error in the said cause, which assignment was as follows:—

"XVI. The learned trial Judge erred in allowing a counsel fee of $3250, since such fee was made with reference to services of counsel before the Interstate Commerce Commission as well as in connection with the institution and prosecution of the present action in the District Court."

14. The said Circuit Court of Appeals erred in not sustaining the seventeenth assignment of error in the said cause, which assignment was as follows:—

"XVII. The learned trial Judge erred in allowing a counsel fee of $3250, since such fee was not restricted

to the services of counsel rendered in connection with the initation and prosecution of the case in the District Court."

[Case No. 294.]

1. The said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania for $33,618.37, and costs of suit, entered on the tenth day of November, A. D. 1916, in favor of said defendants in error and against said plaintiff in error.

2. [Identical with Specification No. 2, in Case 293; *v. supra*, page 10.]

3. [Identical with Specification No. 3, in Case 293; *v. supra*, page 10.]

4. [Identical with Specification No. 4, in Case 293; *v. supra*, page 10.]

5. [Identical with Specification No. 5, in Case No. 293; *v. supra*, page 13.]

6. The said Circuit Court of Appeals erred in not sustaining the sixth assignment of error in the said cause, which assignment was as follows:—

"VI. The learned trial Judge erred in refusing to affirm the third point submitted by the defendant, as follows:

" '3. The Interstate Commerce Commission ascertained the number of cars which the plaintiffs, in the judgment of the Commission, should have received in the period of the action with reference to a rule of distribution promulgated by the Commission after the close of the period of the action. The Commission had no power to make its rule of distribution retroactive,

and hence its conclusion or finding as to the number of cars that the plaintiffs should have received, and its award of damages based thereon are invalid and afford no basis for a recovery in the present case.'" (Record, page 313.)

7. The said Circuit Court of Appeals erred in not sustaining the seventh assignment of error in the said cause, which assignment was as follows:—

"VII. The learned trial Judge erred in refusing to affirm the fourth point submitted by the defendant, as follows:

"'4. In determining the number of cars to which the plaintiffs were entitled the Interstate Commerce Commission was not at liberty to disregard the rule of distribution which it had itself promulgated, but was required to ascertain such number in accordance with this rule.'" (Record, page 314.)

8. The said Circuit Court of Appeals erred in not sustaining the eighth assignment of error in the said cause, which assignment was as follows:—

"VIII. The learned trial Judge erred in refusing to affirm the fifth point submitted by the defendant, as follows:

"'5. Under the rule of distribution prescribed by the Interstate Commerce Commission the plaintiffs were not entitled in the period of the action to any individual cars belonging to other shippers or to any fuel cars either of the defendant or of any other railroad company if these were consigned to other mines. The plaintiffs were entitled to their own individual cars and to their just and proper share of the cars which the defendant had available for distribution among shippers.'" (Record, page 314.)

9. The said Circuit Court of Appeals erred in not sustaining the ninth assignment of error in the said cause, which assignment was as follows:—

"IX. The learned trial Judge erred in refusing to affirm the sixth point submitted by the defendant as follows:

"'6. If the testimony has satisfied the jury that the Interstate Commerce Commission in arriving at the number of cars which the plaintiffs should have received ascertained this number by treating as justly allottable to them the percentage which their mine rating entitled them to of the aggregate of all the cars which were placed by the defendant at the mines in the region in which the plaintiffs' mine was located, regardless of the consideration that there were included in this aggregate a large number of indivdual cars belonging to other shippers, and fuel cars of the defendant and of other railroad companies, which had been placed at other mines, the method adopted by the Commission for ascertaining the number of cars which the plaintiffs should have received was not in accordance with its own rule and was consequently erroneous, and the finding or conclusion of the Commission as to the number which the plaintiffs should have received was therefore invalid and affords no basis for a recovery in the present action." (Record, page 314.)

10. The said Circuit Court of Appeals erred in not sustaining the tenth assignment of error in the said cause, which assignment was as follows:—

"X. The learned trial Judge erred in refusing to affirm the seventh point submitted by the defendant, as follows:

"'7. It appears from the evidence that in arriving at the number of additional cars which, in its judgment, the plaintiffs should have received, the Interstate Commerce Commission failed to give effect in certain periods to the rule of the defendant in force at the time and approved by the Commission by which cars placed at mines were counted as part of the mine's

quota on each day on which they were available for shipments. This rule was a lawful and proper one, and the Commission was not justified in ignoring or disregarding it.'" (Record, page 315.)

11. The said Circuit Court of Appeals erred in not sustaining the eleventh assignment of error in the said cause, which assignment was as follows:—

"XI. The learned trial Judge erred in refusing to affirm the defendant's eighth point as follows:

"'8. The defendant has submitted a statement prepared by a public accountant, purporting to show the number of cars which the plaintiffs would have received if distribution had been made by the defendant in accordance with the rule of the Interstate Commerce Commission. It appears from this statement that the additional cars to which they would have been entitled would not have exceeded 739 cars. Treating each car as having a capacity of thirty-five tons, the tonnage which could have been transported in these cars would have been 25,865 tons, and this tonnage should be accepted by the jury as representing that which the plaintiffs should have received cars for the shipment of, if the jury believe that the statement prepared by the accountant correctly shows the number of cars which, under the Commission's rule of distribution, plaintiffs were entitled to receive in addition to those which were actually delivered to them." (Record, page 315.)

12. The said Circuit Court of Appeals erred in not sustaining the twelfth assignment of error in the said cause, which assignment was as follows:—

"XII. The learned trial Judge erred in refusing to affirm the eleventh point submitted by the defendant, as follows:

"'11. The evidence adduced upon behalf of the defendant has shown that if the plaintiffs had mined any

additional tons in the period of the action, they would have been obliged to pay or expend for each ton the miners' wages, which would have been 63 cents a ton, and the royalty on the coal mined, which would have been not less than ten cents a ton, and that if they had mined 71,257 tons, there would have been additional expense of 7 cents per ton on account of ventilation and supplies, and 6 cents per ton on account of transportation, making a total additional expense of 86 cents per ton. If the jury believe this testimony as to this additional cost, the cost per ton of the coal mined including these 71,257 additional tons, would have been $1.00.'" (Record, page 316.)

13. The said Circuit Court of Appeals erred in not sustaining the thirteenth assignment of error in the said cause, which assignment was as follows:—

"XIII. The learned trial Judge erred in refusing to affirm the twelfth point submitted by the defendant, as follows:

"'12. The evidence has shown that if the plaintiffs had mined any additional tons in the period of the action, they would have been obliged to pay or expend for each ton, the miners' wages, which would have been 63 cents a ton, and the royalty on the coal mined which would have been not less than 10 cents a ton. The additional cost that the plaintiffs would have been subjected to, therefore, had they mined any additional tonnage would have been not less than 73 cents per ton. If the jury believe this testimony as to this additional cost, and there is nothing to contradict it, the cost per ton if 25,865 tons had been mined would have been $1.026.'" (Record, page 316.)

14. [Identical with Specification No. 8 in Case 293; *v. supra*, page 14.]

15. [Identical with Specification No. 9 in Case 293; *v. supra*, page 14.]

16. [Identical with Specification No. 10 in Case 293; *v. supra*, page 14.]

17. [Identical with Specification No. 11 in Case 293; *v. supra*, page 15.]

18. The said Circuit Court of Appeals erred in not sustaining the eighteenth assignment of error in the said cause, which assignment was as follows:—

> "XVIII. The learned trial Judge erred in allowing a counsel fee of $6750, since such counsel fee was excessive."

19. The said Circuit Court of Appeals erred in not sustaining the nineteenth assignment of error in the said cause, which assignment was as follows:—

> "XIX. The learned trial Judge erred in allowing a counsel fee of $6750, since such a fee was made with reference to services of counsel before the Interstate Commerce Commission as well as in connection with the institution and prosecution of the present action in the District Court."

20. The said Circuit Court of Appeals erred in not sustaining the twentieth assignment of error in the said cause, which assignment was as follows:—

> "XX. The learned trial Judge erred in allowing a counsel fee of $6750, since such fee was not restricted to the services of counsel rendered in connection with the initiation and prosecution of the case in the District Court."

ARGUMENT.

In these two cases, which were consolidated for the purpose of trial and for argument in the Circuit Court of Appeals, the issues are so similar that it has seemed not only practicable but desirable to discuss them in one brief. They involve shipments from the same mine during two different, but successive periods. The principles involved are substantially the same in each case. Where there is any difference, it will be pointed out in the course of the argument.

1. THE DISTRICT COURT SHOULD NOT HAVE PERMITTED THE DEFENDANTS IN ERROR TO AMEND THEIR PETITIONS SO AS TO SUE ON ORDERS ENTERED BY THE INTERSTATE COMMERCE COMMISSION WHICH HAD NOT BEEN MADE THE BASIS OF THEIR ORIGINAL PETITIONS. THESE ORDERS HAD BEEN MADE MORE THAN A YEAR PRIOR TO THE FILING OF THE PETITIONS FOR LEAVE TO AMEND THE ORIGINAL PETITIONS.*

As has been pointed out in the statement of facts, the plaintiffs in these two separate actions operated the same mine, but during different periods. In the first period, extending from July 1st, 1902, to October 1st, 1904, the mine was owned and operated by a partnership consisting of James H. Minds and William J. Matz, and with respect to this period Mr. Minds sued as the surviving and liquidating partner of the partnership, Mr. Matz having died in the early part of the year 1904. During the second period, extending from October 1st, 1904, to June 30th, 1907, the mine was owned and operated by a new partnership consisting of James H. Minds and Julia A. Matz. In view of the fact that the mine was thus operated by two distinct partnerships, two proceedings were initiated before the Interstate Commerce Commission, one a proceeding

* This point is covered by specifications of error Nos. 1, 3, 10 and 11, in case 293, and specifications of error Nos. 1, 3, 16 and 17, in case 294.

known on the docket of the Interstate Commerce Commission as No. 1137, in which James H. Minds, the surviving and liquidating partner of James H. Minds and William J. Matz, was the complainant, and the second known on the docket of the Interstate Commerce Commission as case No. 1136, in which James H. Minds and Julia A. Matz were the complainants. The first proceeding eventuated in an order in favor of the complainants for $18,591.48, entered by the Commission on March 11th, 1912. On the same day, the Commission entered an order in case No. 1136 in favor of James H. Minds and Julia A. Matz for $31,715.57.

The Railroad Company having failed to pay the amounts awarded by the Interstate Commerce Commission, actions were begun in the District Court; but, in the petitions filed, each petitioner set up as its cause of action, not the award made in its favor, but the award made in favor of the other partnership. Thus, as appears on page 5 of the Transcript of Record, in case No. 293 James H. Minds the surviving and liquidating partner, sues to recover $31,715.57, with interest, and alleges as the basis of his action the order entered by the Interstate Commerce Commission in case No. 1136 (see page 10 of the Transcript of Record), and in case No. 294 James H. Minds and Julia A. Matz sue to recover $18,591.48 (page 5 of the Transcript of the Record), and set up as the basis of their action the order entered by the Commission in case No. 1137 (see page 10 of the Transcript of Record).

On April 5th, 1916, more than four years after the date of the orders entered by the Interstate Commerce Commission, the plaintiffs filed petitions in their respective cases to amend the original petitions so as to enable them to sue on the orders entered in their own favor, and these petitions were allowed over the objections of the Railroad Company. It is respectfully submitted that the action of the Court in permitting this amendment was improper.

Section 16 of the Act to Regulate Commerce provides in the last sentence of paragraph 2 that

> "A petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court or the State Court within one year from the date of the order, and not after."

The binding effect of this provision is well illustrated in the case of Phillips & Co. *vs.* Grand Trunk Western Ry., 236 U. S. 662 (1915). In that case the plaintiff brought suit in the United States Circuit Court for the Eastern District of Michigan, claiming to recover overcharges in connection with certain shipments of lumber. It appeared that the shipments had moved under a rate which, in another proceeding to which the plaintiff was not a party, had been found by the Interstate Commerce Commission to be unreasonable. The plaintiff, however, had presented no complaint to the Interstate Commerce Commission, and at the time suit was begun in the United States Circuit Court, it was too late for him to do so. Commenting upon that provision of Section 16 of the Act to Regulate Commerce, which is in immediate juxtaposition with the provision just referred to, and which requires that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after," this Court held that, under such a statute the lapse of time not only bars the remedy but destroys the liability, whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. The Court says (page 667): "The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier. The Railroad Company therefore was bound to claim the benefit of the statute here and could do so here by general demurrer. For when it appeared that the complaint had not been filed within the time required by the statute it was evident, as matter of law, that the plaintiff had no cause of action."

The situation in the present proceedings is directly within the principle announced in this case. Whatever may have

been the reason for the form of petition filed in each of these cases, the fact is that each plaintiff sued on an order in favor of the other plaintiff. It did not sue on the order made in its favor and its effort to correct this by an amendment made more than four years after the date of the order entered by the Interstate Commerce Commission is clearly prohibited by the terms of the statute as interpreted in the Phillips case referred to.

In addition, the rule is well settled that defenses of this character may not be waived by the carriers: Georgia &c. Ry. *vs.* Blish Co., 241 U. S. 190 (1916), at page 197; M. K. & T. Ry. Co. *vs.* Ward, 244 U. S. 383 (1917) at page 388; U. S. *ex rel.* Louisville Cement Co. *vs.* I. C. C., 246 U. S. 638 (1918): cf. B. & O. *vs.* Leach, No. 132, Oct. T., 1918, decided Mar. 10, 1919.

The defendant in error cannot properly contend that the petitions were erroneous in an incidental feature. Each one clearly identifies the order upon which suit was brought and each one sets forth the precise amount awarded not to the petitioner, but to some one else. As a consequence, the amendment introduced a new cause of action and one which could not properly be introduced because of the specific provision of the Act to Regulate Commerce referred to.

In dealing with this feature of the situation the Circuit Court of Appeals did not question the correctness of the Railroad's statement of what took place. On the contrary the Court, confirming this statement said:—

> "Two proceedings were brought, the first by Minds as surviving partner, covering the first period; the claim was for about $80,000 damages, and in March, 1912, a reparation order was entered for about $18,600 with interest from June 28, 1907. The second proceeding was by Minds and Julia Matz, trading as the Bulah Coal Company, and covered the second period; the claim was for about $75,000 damages and the order, also entered in March, 1912, was for about $31,700 with interest from June 28, 1907. Neither award was paid, and on each a separate action was brought. By mistake the awards were confused, so that *Minds as*

> *surviving partner sued on the order entered in favor of Minds and Julia Matz, while Minds and Julia Matz sued on the order entered in favor of Minds as surviving partner.** This was an obvious blunder, and on April 10th, 1916, the District Court allowed the orders to be transposed, the Railroad objecting, then and now, on the ground that such an amendment could not be granted after one year from the date of the orders." (Transcript of Record, page 345.)†

But the Court, having thus stated correctly what had taken place, says in disposing of the Railroad's objection:—

> "As we understand, however, this position is not much relied on, and in any event we see no reason to say anything about it except to approve the action of the District Court in setting right what was a plain and harmless mistake. Its correction did the Railroad no possible injury." (Transcript of Record, page 345.)

It is earnestly insisted by counsel for the Railroad that the Court labored under a misapprehension in suggesting that the point was "not much relied on," since it has been emphatically urged at every stage of this litigation. But, even had this not been the case, the Railroad, under the authorities cited, would not have been justified in waiving the point, nor the Court in holding that it had been waived.

2. INSTRUCTIONS GIVEN BY THE COURT WITH RESPECT TO THE FINDINGS OF THE INTERSTATE COMMERCE COMMISSION AS TO THE AVERAGE COST OF PRODUCTION WHICH WOULD HAVE BEEN INCURRED HAD THE DEFENDANTS IN ERROR BEEN FURNISHED WITH THE ADDITIONAL CARS TO WHICH THE COMMISSION FOUND THEY WERE ENTITLED.‡

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* Italics ours.

† Where in this argument the "Transcript of the Record" is referred to, the transcript in case No. 293 is intended unless otherwise specified.

‡ This point is covered by specifications of error Nos. 4, 6 and 7, in case 293, and specifications of error Nos. 4, 12 and 13, in case 294.

In ascertaining the damages to be awarded the defendants in error, the Interstate Commerce Commission made findings as to the additional tonnage which might have been mined and shipped with the additional cars to which they held the Coal Companies entitled, and also findings as to the hypothetical cost of production which would have been incurred if this additional tonnage had been mined during the two periods of action, and as to the possible prices which might have been received for the coal. Obviously, therefore, this hypothetical cost of mining constitutes an important and essential increment in determining the measure of the plaintiff's recovery, and if it is erroneous results in an erroneous award. The testimony shows beyond doubt that the findings of the Commission in this regard are patently wrong.

With respect to the first period, viz., that covered by case No. 293, the Interstate Commerce Commission found (Transcript of Record, page 22), that if the Coal Company had been able to mine the additional tonnage for which the Commission finds they were entitled to receive additional cars, they would have been able to produce an output of 9523.68 tons in addition to the tonnage actually produced. They found further that during this period the mine actually shipped 110,892 tons, and that the actual average cost of the tonnage produced was $1.23 (Transcript of Record, pages 22 and 23). The Commission further finds that, had the mine been able to produce the additional 9523 tons, the cost of mining would have been only 88 cents per ton. This, on its face, seems to be, as the trial Judge was inclined to describe it, a mathematical absurdity (Transcript of Record, page 300), since, if these figures are correct, they mean that the aggregate cost of mining the coal actually mined, plus the cost of mining the additional 9523 tons would have been less than the cost of mining the coal which was in fact mined. Thus the tons actually mined and shipped during the first period as found by the Commission amounted to 110,892, and the average cost of mining this tonnage was, as found by the Commission, $1.23.

This would make an aggregate cost for this tonnage of $136,397.16. The Commission found that with the cars to which they were entitled, the plaintiffs could have mined during this first period 9523.68 tons additional, or a total tonnage of 120,415.68. At 88 cents per ton, the average cost found by the Commission, this would mean a total aggregate cost of $105,965.80. In other words, more than $20,000 less than it cost to mine the tonnage that was actually mined. Obviously, if the Commission's finding had even the semblance of reasonableness, it would have been economical for the plaintiffs to have mined this additional tonnage and burned it at the pit's mouth; and this they should have done under the well settled rule of law, which makes it their duty to take all reasonable measures to minimize the damages resulting from the defendant's alleged wrong doing. The truth is, however, that the finding of the Commission is preposterous.

If we assume that the additional tonnage of 9523.68 could have been mined for nothing, and that the plaintiffs could have obtained therefor the price referred to by the Commission, viz., $1.598, they would have obtained $6197.00 for this tonnage, and yet the jury has awarded them $10,990.11, to which they have added interest. It is difficult to imagine a case in which it could be demonstrated more conclusively that the findings of the Commission are founded upon an improper basis.

However, the Court in offering an explanation to the jury of this conclusion of the Commission, which was characterized substantially as a mathematical absurdity, suggested certain possibilities, *e. g.*, irregularity of car supply, which, it was said, might tend to explain the Commission's finding and validate it. It is respectfully submitted that there is no evidence in the record which would indicate that the irregularities referred to by the learned trial Judge would have operated in the manner suggested, *particularly in view of the finding of the Commission that there was no basis on which they could assess any damages except on the basis of a failure of the Coal Companies to receive their proper proportion of cars available for distribution.*

Thus in its findings of fact the Commission says (see page 228 of the Transcript of Record):—

> "While there are also other things shown of record which put the defendant on explanation and properly subject it to just criticism, the only point upon which the record affords a sufficient basis for affirmative findings grows out of the rules and system then in effect for the distribution of available equipment among the various coal mining operations."

Again, on page 54 of its original report (20 I. C. C.), (see page 227 of the Transcript of the Record), the Commission finds as follows:—

> "The complainants characterize as a special discrimination against their mine the fact, as is alleged, that they repeatedly had great difficulty in getting the trainmen and agents of the defendants to place on their siding and at their tipple the cars that had been assigned for delivery to them. It is said that the cars were frequently left at the foot of the siding, and that the complainants had to pull them into place with mules. It is also said that the cars were frequently delivered so late in the morning as not to leave them available during that day, and that cars delivered late in the day were not infrequently charged against that day's quota of cars and against the quota of the following day as well. On these matters, however, we do not find a sufficient basis in the record for affirmative conclusion, or anything to indicate that the complainants in those respects were put by the defendants on any less favorable basis than their competitors."

Furthermore, the findings of the Commission as read into the record by the plaintiff on page 71 of the Transcript of Record, show that the award is based entirely on the same proposition, the damages being measured by the tonnage which might have been mined, sold and shipped "if the

complainants had received their proper proportion of the cars available for distribution."

None of the testimony in the present record affords any other basis for the finding of any damages by the jury, and consequently the only verdict which can be justified under the evidence is a verdict based on the cost of mining and producing the additional tonnage which could have been mined and produced had additional cars been available for transportation.

It is true that there was read into the record testimony taken before the Interstate Commerce Commission indicating irregularities in the distribution of cars to the coal companies, but *this action is founded on discrimination*, and unless this testimony had been supplemented by evidence that these coal companies fared in this regard differently from other companies, the testimony constitutes no basis for an award of damages. The testimony of Mr. Davis with regard to the deliveries to the Berwind-White Coal Mining Company does not in any way show that that Company was preferentially treated, since this testimony did not show the character of cars delivered to that Company. As is pointed out in the report of the Commission attached to the plaintiff's petition (Transcript of Record, page 33), the greater regularity of car supply made available to the Berwind-White Coal Mining Company was partly explained by the fact that that Company owned a large supply of private cars and had railway fuel contracts. The findings of the Commission just referred to negative any differential treatment in this respect and consequently the Coal Companies are relegated to the one basis of recovery, and the only relevant question is whether their cost of production would have been reduced to the extent found, had they received additional cars.

Simple mathematics show that the Commission is entirely wrong in this feature of the case. But, in addition, it must be remembered that, as testified by Mr. Hatfield (pages 81 to 88 of the Transcript of Record) *every additional ton of coal would have involved certain inescapable*

costs. As he explained, during the first period it would have been absolutely necessary to pay the so-called mine rate and the royalty. The mine rate, as testified by Mr. Davis, was 62 cents up to April, 1903, after which it was 66 cents (Transcript of Record, page 81). The royalty was in no case less than 10 cents per ton (Transcript of Record, page 80). Consequently, Mr. Hatfield testifies each additional ton of coal mined during the first period would have involved an inescapable additional cost of 73 cents per ton, and that this would have resulted in an average cost of $1.19 per ton for the tonnage which the Commission finds was the total tonnage which the plaintiff was entitled to mine and ship during this period.

The situation is substantially similar during the second period, that is, during the period covered by case No. 294, with the qualification that the Commission's finding in this period does not involve the palpable mathematical absurdity which appears in the first period. But, as testified by Mr. Hatfield, in this period the additional tonnage which the Commission finds might have been mined and shipped is a much larger proportion of that which was actually mined and shipped than in the case in the first period; and he therefore testifies that there would have been certain inescapable costs in addition to the mine rate and the royalty consisting of a cost of gathering and delivery fixed at 7 cents per ton and a cost of ventilation and mine supplies fixed at 6 cents per ton, which make a total inescapable cost for each additional ton of coal of 86 cents (Transcript of Record, page 87). With these additional inescapable costs the average cost per ton, as testified by the witness, would have been $1.00 instead of 88 cents, as found by the Interstate Commerce Commission (Transcript of Record, page 23).

To bring this matter properly before the jury, the Railroad Company presented in case 293 its points 11 and 12, the refusal of which is covered by specifications of error Nos. 6 and 7. In case No. 294 covering the second period, the same question was presented by points Nos. 11 and 12,

the refusal of which is covered by specifications of error in this case Nos. 12 and 13. These points were as follows:—

"11. [Case 293] The evidence has shown that if the plaintiffs had mined 9523.68 additional tons they would have been obliged to pay for each ton the miners' wages, which would have been 62 cents a ton prior to April 1st, 1903, and 66 cents a ton thereafter, and a royalty of 10 cents a ton. Upon the basis of an average mining charge for the period of 63 cents a ton, the additional cost that the plaintiffs would have been subjected to had they mined the additional 9523.68 tons would have been 73 cents per ton, and the aggregate cost of mining the additional 9523.68 tons would have been $6952.28. If the jury believe the testimony as to this additional cost, and there is nothing to contradict it, it is mathematically demonstrable that the cost of mining the 120,415.68 tons would have been $1.19 per ton, and this figure should be accepted by the jury in arriving at the plaintiff's damages." (Record, page 310.)

"12. [Case 293] The Commission found, and this finding is not contradicted, and should be consequently accepted by the jury, that the plaintiffs would have realized an average price of $1.598 per ton for the 9523.68 additional tons, and if the jury find that the plaintiffs' average cost of producing the same would have been $1.19 per ton, the difference between these two amounts, viz., 40.8 cents, represents the profit per ton which the plaintiffs failed to realize in the period of the action because of the non-receipt of the cars for the shipment of the 9523.68 additional tons." (Record, page 311.)

"11. [Case 294] The evidence adduced upon behalf of the defendant has shown that if the plaintiffs had mined any additional tons in the period of the action, they would have been obliged to pay or expend for each ton, the miners' wages, which would have been 63

cents a ton, and the royalty on the coal mined, which would have been not less than 10 cents a ton, and that if they had mined 71,257 tons, there would have been additional expenses of 7 cents per ton on account of ventilation and supplies, and 6 cents per ton on account of transportation, making a total additional expense of 86 cents per ton. If the jury believe this testimony as to this additional cost, the cost per ton of the coal mined including these 71,257 additional tons, would have been $1.00." (Record, page 316.)

"12. [Case 294] The evidence has shown that if the plaintiffs had mined any additional tons in the period of the action, they would have been obliged to pay or expend for each ton, the miners' wages, which would have been 63 cents a ton, and the royalty on the coal mined, which would have been not less than 10 cents a ton. The additional cost that the plaintiffs would have been subjected to, therefore, had they mined any additional tonnage would have been not less than 73 cents per ton. If the jury believe this testimony as to this additional cost, and there is nothing to contradict it, the cost per ton if 25,865 tons had been mined would have been $1.026." (Record, page 316.)

The Court having refused to affirm these points, discussed the matter in a portion of his charge, which constitutes the second assignment of error in each case (printed on pages 294 to 297 in the Transcript of Record). As there appears, the Court sought to afford the jury a basis for accepting the finding of the Commission in the face of the evidence adduced, and although the support which he seeks to furnish is not justified by the Record. As will be observed by referring to the charge, he says, after pointing out the Railroad's contention:—

"But you are to consider the argument addressed to you by counsel upon the other side, and their explanation of that phenomenon. I do not pretend to

present all of it to you, but just enough to give you an illustration. Take a man who is shipping coal, for instance, and all his cars come to him in a regular way at the times at which he may employ his men right at once in filling them, getting them out of the way, bringing empties in and filling them and getting them out of the way, the result would be that he could get the amount at a unit cost of a certain amount per ton, but if he had the men there and their wages going on and all the other expenses going on, and they were standing there idle doing nothing for an hour or two hours or three hours, or there were breaks and interruptions in the continuity of his work in the one case, then it would be easily understood that under one condition of work it might cost the man $123 to get out one hundred tons, and under the other more favorable conditions of work he might be able to get out one hundred and twenty tons at an aggregate cost of $105."

The vice of this suggestion is that it allows the jury to discard the actual evidence adduced and award damages practically for discrimination in irregularity of car supply, although *there is no evidence whatsoever that in this regard the Coal Companies fared differently from other coal companies in the region; but, on the contrary, affirmative evidence disclosed in the findings of the Commission itself, introduced into the record, shows that there was nothing to indicate that these Coal Companies fared differently from other operators.* Clearly, the charge of the Court was calculated to permit the jury to base its verdict on a supposition which was not only without support in the record, but actually contrary to the facts contained therein. Apparently the trial Judge was under the impression that no matter what evidence might be offered with respect to the findings of the Interstate Commerce Commission, they still were of sufficient weight to preclude him from instructing the jury in accordance with the points submitted by the Railroad.

It is respectfully submitted that, in the light of the decision of this Court in the case of Pennsylvania Railroad Company *vs.* Jacoby & Company, 242 U. S. 89 (1916), it is clearly the province of the trial Court to sustain points such as those submitted by the Railroad, since, just as in the Jacoby case, the Commission's errors are susceptible of mathematical demonstration.

With respect to this feature of the case, the Circuit Court of Appeals said:—

> "The railroad complains, but we think without sufficient warrant, that the trial Judge erred in what he said to the jury in submitting the question how much the cost of mining would have been, if the plaintiffs had received their proper share of cars. We think his instructions were sufficient, and see no occasion to discuss them. Moreover, on this subject the evidence was conflicting, and, since the credibility of opposing testimony was involved the railroad was not entitled to binding instructions. The verdict on this point must be accepted as final."

It is respectfully submitted that neither in the opinion of the trial Court nor in that of the Circuit Court of Appeals is there any answer to the contentions of the Railroad. And, that the principles announced in the Jacoby case justified the Railroad's request for the affirmance of its points, because of the mathematical basis underlying them, will be more fully considered in connection with the next branch of the discussion.

3. THE COURT'S ERROR IN THE MATTER OF THE COMMISSION'S DISREGARD OF ITS OWN RULE OF DISTRIBUTION IN AWARDING DAMAGES.*

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* This point is covered by specifications of error Nos. 7, 8, 9, 10, 11 and 12, in case 294.

This proposition relates exclusively to the second period and is pertinent only to case No. 294.

The rule of distribution prescribed by the Interstate Commerce Commission recognizes four classes of cars, three of which constituting the so-called assigned cars are (*a*) the private or individual cars, (*b*) the cars of foreign railroads sent into the mining region for fuel shipments for the owning companies, and (*c*) the cars placed by the plaintiff in error itself at mines from which it is to receive purchases of coal. The so-called unassigned cars include the remaining cars which are sometimes designated commercial cars. The assigned cars are distributable to the specific mines designated by the owners of the cars without regard to whether the cars so distributed equal or exceed the distributive share to which the mines in question are entitled. This is in accord with the Commission's own rule. According to this rule, the other mine operators are not entitled to share in the distribution of these cars, but only in the distribution of the unassigned cars. Hillsdale Coal & Coke Co. *vs.* P. R. R. Co., 19 I. C. C. 356 (1910), at page 364. (Record, 247).

In its consideration of the Railroad's rule of distribution the Interstate Commerce Commission found but one feature which it condemned, viz., that the assigned cars were counted in reduction of the ratings of the mines which received them, and not in reduction of the distributive share to which such mines would have been entitled. The Commission gave its full sanction to the proposition that the other operators were not entitled in any way to share in the distribution of these assigned cars. Hillsdale Coal & Coke Co. *vs.* P. R. R. Co., *supra* (Record, 235).

Now the undisputed testimony shows that the Commission, disregarding its own rule of distribution, ascertained the additional tonnage on which it allowed damages on the basis of possible profits, by finding the percentage relation between all the cars distributed in the region and the total region ratings, and applying this percentage relation to the ratings of the mine of the Bulah Coal Company.

In support of this statement, the Court's attention is respectfully directed to the testimony of Mr. H. H. Twose, a certified public accountant (pages 129 to 147 of the Transcript of Record). It appears at page 103 that a blue print was offered and received in evidence which is designated Defendant's Exhibit No. 1, and is printed at page 231 of the record. This exhibit had been transmitted to the Commission by Mr. John H. Minds, one of the counsel for the Bulah Coal Company in connection with the case before that tribunal. This blue print purports to show the distribution of cars on the Tyrone Division of the plaintiff in error, the division on which was located the plaintiff's mine. Mr. Twose testified that having examined the report of the Interstate Commerce Commission, he finds that in the first period of the action, which is from June, 1902, to October, 1904, the tonnage which the Commission finds the Coal Company might have mined and shipped with a proper proportion of cars is 36.2 per cent. of its total rated capacity. He further testifies that this is the precise percentage ascertained by taking the average of the percentages shown on Exhibit No. 1 for the nine quarters of this period, which represent the percentage relation of *all the cars in the region* to the total region ratings. Having made a similar calculation for the second period, he finds that the tonnage which the Commission determined the Coal Company might have mined and shipped from its mine was 52.7 per cent. of its rated capacity for this entire period, and that this is the precise percentage ascertained by taking the average of the ten percentages for the ten quarters included in this period as shown on Exhibit No. 1, and that here again the percentage relation is that which exists between all the cars in the region and the total region ratings.

This testimony of Mr. Twose was as follows (pages 129 ff.):—

> "Q. Mr. Twose, you testified yesterday afternoon, as I recall, that in making your examination you had before you the distribution sheets, the report of the Interstate Commerce Commission upon the case, and

the blue print which has been offered in evidence as Defendant's Exhibit No. 1. Is that correct?

"A. That is correct.

"Q. Do you know what the Commission found to be the fair rating of the plaintiff's mine?

"A. Five hundred and sixty tons per day.

"THE COURT:—I suppose the fair rating means that the fair and reasonable business expectation is that if they were fully supplied with cars their output would amount to that much? Is that the idea?

"MR. BIKLE:—I think that is a fair description, your Honor.

"THE COURT:—We will understand it in that way, then, that if they had all the cars which they could use, then their mine equipment was such that they could ship that many tons per day?

"MR. BIKLE:—That is right.

"By MR. BIKLE:

"Q. What did the Commission find would be the fair number of days per month the mine could have worked?

"A. Twenty-two.

"Q. How many months are included in the first period of this case, extending from June 1, 1902, to October 1, 1904?

"A. Twenty-seven months.

"Q. What would the aggregate tonnage be for that period if there was a full supply for every working day?

"A. 332,640 tons.

"Q. What did the Commission find would have been the output with the cars to which the Commission found they would have been entitled?

"A. In this first period?

"Q. Yes.

"A. 120,415.68 tons.

"Q. What percentage is that of the full possible

output of the mines with the supply of cars as first indicated?

"A. 36.2 per cent.

"Q. Is there anything on the blue print which corresponds with that figure?

"A. Yes, sir.

"Q. What is it?

"A. If you take the quarterly percentages shown on the blue print for the nine quarters of that period—that is, the percentage of cars available for distribution to the regional rating—take those nine percentages and add them together and divide by nine, you arrive at your percentage, which I mentioned before, of 36.2.

"Q. That is the average, then?

"A. That is the average.

"Q. Of those percentages?

"A. Of those percentages.

"Q. And those percentages are the percentages that are found in the eleventh column of the blue print?

"A. Yes, sir.

"Q. How is that column headed on the blue print?

"A. 'Per cent. based on division rating.'

"Q. During the second period, extending from October 1, 1904, to June 30, 1907, the Commission's statement as to the fair rating and the number of working days remain the same?

"A. It does remain the same.

"Q. How many months are there in that period?

"A. Thirty-three months.

"Q. What would be the total tonnage with a full output for every working day?

"A. 406,560 tons.

"By THE COURT:

"Q. So we can follow your testimony, Mr. Twose, as we go along, that merely means that taking thirty-three months, twenty-two days in each month, and an output of 560 tons a day, and making a calculation

from those three bases, you get the result 406,560 tons?

"A. Exactly.

"By MR. BIKLE:

"Q. What did the Commission find would have been the output with the share of cars to which the Commission found this mine entitled in this second period?

"A. 214,257.12 tons.

"Q. What percentage is that of the full output which would have been made if they had mined 560 tons for twenty-two days in the thirty-three months?

"A. 52.7 per cent.

"Q. Does that percentage correspond to anything on the blue print?

"A. It corresponds to the column to which I referred, 'Per cent. based on division rating,' for the ten quarters of the period in question. Add those ten percentages together and divide by ten, and you arrive at this percentage, average percentage, of 52.7 per cent.

"By THE COURT:

"Q. Won't you explain right there, in the same way in which you did as to the 332,640 tons and the 406,560 tons, how the other figures of 120,415.68 and the 214,257.12 were reached?

"A. If you take the 332,640 tons for the first period and find the 36.2 per cent. of it you will arrive at the Commission's award, or the figure arrived at in the Commission's award of 120,415.68 tons.

"Q. In other words, that is in the one case 36.2 per cent. and in the other 52.7 per cent. of that first utmost output of the mine?

"A. Exactly."

But, as appears on Exhibit No. 1, the cars in the region were cars of different classes including individual cars and foreign cars, in which, under the Commission's own rule,

the plaintiffs were not entitled to share. Moreover, as will appear from the Commission's report in the Hillsdale case, that company had been specifically denied any right to share in the distribution of these private and fuel cars.

"It is scarcely necessary to add," says the report of the Commission in that case, "that the complainants second request for a finding and for an order requiring the defendant, during percentage periods, to distribute ratably among operators, according to the actual output capacity of their mines, 'all cars adapted to and used for carrying bituminous coal,' whether company fuel cars, foreign railway fuel cars, or private cars, must be denied" (Transcript of Record, page 250).

And as already stated this Report although entitled in the Hillsdale case was treated by the Commission as applicable to all the cases grouped with it.

The Court was accordingly asked to charge the jury that the Commission was bound to follow its own rules of distribution and that the plaintiff was not entitled to share in the distribution of individual cars belonging to other shippers or in fuel cars belonging either to the defendant or to any other railroad company if they were consigned to other mines, and that if the jury was satisfied that the Commission in arriving at the number of cars which the plaintiffs should have received, ascertained the number justly allottable to them, with reference to the percentage which their mine rating entitled them to of the aggregate of *all cars in the region*, regardless of the considerations referred to, the method adopted by the Commission was erroneous and the findings of the Commission were invalid, and no basis for a recovery was offered in this case.

Points Nos. 4, 5 and 6 covered by specifications of error Nos. 7, 8 and 9, refer to this feature of the situation. They are as follows:—

> "4. In determining the number of cars to which the plaintiffs were entitled the Interstate Commerce Commission was not at liberty to disregard the rule of distribution which it had itself promulgated, but

was required to ascertain such number in accordance with this rule.

"5. Under the rule of distribution prescribed by the Interstate Commerce Commission the plaintiffs were not entitled in the period of the action to any individual cars belonging to other shippers or to any fuel cars either of the defendant or of any other railroad company if these were consigned to other mines. The plaintiffs were entitled to their own individual cars and to their just and proper share of the cars which the defendant had available for distribution among shippers.

"6. If the testimony has satisfied the jury that the Interstate Commerce Commission in arriving at the number of cars which the plaintiffs should have received ascertained this number by treating as justly allottable to them the percentage which their mine rating entitled them to of the aggregate of all the cars which were placed by the defendant at the mines in the region in which the plaintiffs' mine was located, regardless of the consideration that there were included in this aggregate a large number of individual cars belonging to other shippers, and fuel cars of the defendant and of other railroad companies, which had been placed at other mines, the method adopted by the Commission for ascertaining the number of cars which the plaintiffs should have received was not in accordance with its own rule and was consequently erroneous, and the finding or conclusion of the Commission as to the number which the plaintiffs should have received was therefore invalid and affords no basis for a recovery in the present action."

The Court refused to give these instructions, and in fact failed entirely to discuss the matter in its charge to the jury. The Court admits that this afforded the Railroad a real basis of complaint (Transcript of Record, page 326), but excuses the "oversight" on the ground that counsel for the Railroad did not call his attention to the omission

from his charge. It is difficult to see the force of this excuse, when it is remembered that specific points were presented covering the question, and when it is noted that, as shown on page 303 of the Transcript of Record, counsel for the Railroad called the Court's attention to the fact that the Commission's finding as to the possible additional tonnage was disputed.

In view of the decision of this Court in the case of Pennsylvania Railroad Company *vs.* Jacoby & Company, 242 U. S. 89 (1916), it is respectfully submitted that the Court erred in failing to charge as requested. In that case, which was treated by the Interstate Commerce Commission as a companion case to these and two other proceedings, the Railroad Company, by testimony similar to that produced in the present proceeding, showed that the Interstate Commerce Commisison had awarded damages not in accordance with its rule, and on the basis of the proportionate share of cars to which the mine operator would have been entitled under the Commission's rule of distribution, but by using a percentage which represented the relationship between the cars delivered to one special mine operator and the ratings of that mine. Upon this evidence, the Railroad Company requested the Court to instruct the jury as follows:—

> "8. If the jury should find that the conclusion of the Interstate Commerce Commission that the plaintiffs in the year ending April 1, 1905, should have received cars equal in capacity to 59.9% of the aggregate of their daily mine ratings, and in the period between April 1 and October 18, 1905, cars equal in capacity to 59.6% of the aggregate of their daily mine ratings, was reached or arrived at because of the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those comprised in the region in which the plaintiff's mine was located had been equal in the earlier period to 59.9% and in the later period to 59.6% of the aggregate ratings of these selected mines,

the basis for the Commission's conclusion and award was an erroneous one, and the plaintiffs consequently are not entitled to recover."

The trial Judge refused this instruction, and its ruling in this regard was held error by this Court. In discussing the point this Court made the following comments, which, we think, are decisive of the present issue:—

"In view of the testimony as we have already stated it, we think the Company was entitled to have this eighth request given in charge to the jury. Nor do we think this refusal was cured by the charge that the finding of the Commission was *prima facie* correct, and entitled to weight as such unless the defendant produced evidence to show that some other state of facts existed, and that the plaintiffs had not suffered the damages awarded to them by the Commission, and the charge in general terms that it was the duty of the Company to apportion and deliver to the plaintiffs their fair share of all cars available during the period of the action to shippers in the district in which plaintiffs' mine was located, and that if plaintiffs received their full and proportionate share of cars in the district they had no cause for complaint against the Company and the burden was upon the plaintiffs to establish by satisfactory proof that they did not receive their share; nor by other parts of the charge in which the jury was told in general terms that the shipper was entitled to recover the full amount of damages which he sustained, and that in arriving at such damages the jury could only take into consideration whether they had been discriminated against, and to what extent they were damaged by that discrimination, and that, if the Berwind-White Company got 59 per cent. of its output when the average allottable was 28 per cent., it did not necessarily follow that the plaintiffs would be damaged the entire difference between 28 per cent.

and 59 per cent., but their damage would be the amount to which their number of cars was reduced in the general allotment by favoring somebody else and taking the cars from them. However correct these general observations may have been, we think it was error in the state of the record to which we have already referred to refuse the specific charge requested.

"It is urged that the testimony before the Commission is not all in the record, and that for aught that appears the Comission may have reached its conclusion and awarded damages upon other and competent proofs, and it is insisted that the coincidence of the amount as awarded and the amount ascertained by the use of the percentages contained in the tables may not necessarily have controlled the action of the Commission. But it is difficult to reach the conclusion that the Commission could have arrived at the result so exactly corresponding with the one obtained by the use of the percentages shown in the tables, except by actually using them to ascertain the sum which is exactly the amount resulting from their application. The Commission might have approximated the same result by using other and legal means to ascertain the damages sustained, but when it is demonstrated that the use of the percentages precisely produces the amount awarded to the dollar and cent, it seems almost mathematically certain that the result could have been reached in no other way. At least, we think that the testimony was in such shape that, as we have already said, the Company was entitled to the specific request upon this subject submitting the matter to the jury."

That the instructions asked for should have been given, has been recognized by the trial Judge himself before whom another case, constituting one of the same group of cases, viz., the case of Clark Brothers Coal Mining Company *vs.* Pennsylvania Railroad Company, was tried shortly after the instant cases and which resulted in a verdict in

favor of the plaintiff there upon rulings similar in principle to those here complained of. The Jacoby decision was handed down by this Court after the trial Judge had refused motions for new trials in the instant cases, but while the motion for a new trial in the Clark Brothers Coal Mining case was still pending. It is of the greatest significance, therefore, that he himself recognized the applicability of the principle announced by this Court in the Jacoby case, and awarded a new trial in the Clark Brothers case.

Clark Bros. Coal Mining Co. *vs.* Pennsylvania R. R. Co., 238 Fed. 642 (1916).

As will be observed, the point submitted in the Jacoby case, after outlining what the jury might find upon the evidence, concluded with a request for an instruction that "the basis for the Commission's conclusion and award was an erroneous one, and the plaintiffs consequently are not entitled to recover," and this Court held that the Railroad Company was entitled to have this instruction given. It therefore follows that if the jury should have found the facts as outlined in the Railroad's sixth point, the answer to which constitutes the ninth assignment of error, the Railroad Company was entitled to a verdict.

But the testimony of Mr. Twose went still further. He explained that he had made an examination of the distribution sheets of the Railroad Company in which were set forth the distribution of cars in the Tyrone region of the Pennsylvania Railroad, from October, 1904, to June 1st, 1907, inclusive, with a view to ascertaining the cars to which the Coal Company was entitled under the Commission's rule (Transcript of Record, pages 104, 133). In view of the fact that under the Commission's rule the mine operator owning cars or having fuel contracts with the plaintiff in error or with other railroads, was entitled to all such cars irrespective of his percentage share, and since other operators were not entitled to share in these cars, and since under the modification of the Railroad's rule made by the Interstate Commerce Commission an operator receiving any indi-

vidual or fuel cars more than his percentage allotment was not entitled at the period in question to share in the commercial cars, it is manifest that, to ascertain the number of cars to which the Coal Company would have been entitled under the Commission's rule of distribution, it would have been proper to exclude from the distribution mines receiving individual and fuel cars in excess of their percentage share, and treat them as though they were no longer in the region. This would necessarily involve, of course, the elimination also of their ratings from the region ratings. This having been done, it would then be possible to ascertain the percentage of the remaining distributable cars to which the plaintiff would be entitled.

Applying the Commission's rule of distribution Mr. Twose shows the result in the Defendant's Exhibit No. 3 (page 233 of the Transcript of Record). The process is explained in detail in the testimony of Mr. Twose, at pages 133 to 147 inclusive. From this statement, it appears that the net shortage during the period extending from October, 1904, to June, 1907, was 392 cars. The gross shortage was 834 cars. Excluding the cars "over" during 1907 the net shortage was 739 cars.

In computing the tonnage represented by these cars, it appears that 25 tons were regarded as representing the loading of a car prior to November 16th, 1905. After that date 35 tons were regarded as the loading of a car (Transcript of Record, page 144).

In the light of this testimony, the Railroad Company presented the following point:—

> "8. The defendant has submitted a statement prepared by a public accountant, purporting to show the number of cars which the plaintiffs would have received if distribution had been made by the defendant in accordance with the rule of the Interstate Commerce Commission. It appears from this statement that the additional cars to which they would have been entitled would not have exceeded 739 cars. Treating each car as having a capacity of thirty-five tons, the tonnage

which could have been transported in these cars would have been 25,865 tons, and this tonnage should be accepted by the jury as representing that which the plaintiffs should have received cars for the shipment of, if the jury believe that the statement prepared by the accountant correctly shows the number of cars which under the Commission's rule of distribution plaintiffs were entitled to receive in addition to those which were actually delivered to them."

The Court refused to affirm this point and its action in this regard constitutes the 11th assignment of error in this case. In view of the decision of this Court in the Jacoby case, the Court's action, it is submitted, was clearly erroneous.

In its opinion dealing with this feature of the case the Circuit Court of Appeals said:—

"In some respects the case now in hand is like Jacoby's case, but it differs in what we regard as a material particular. Laying aside the fact that the present plaintiffs offered other evidence than the commission's findings and orders, we think it important to observe that the principal of each verdict is for a sum considerably less than the principal of the Commission's award, so that the recovery here does not rest on the award alone, but is undoubtedly based on all the evidence touching the subject of the plaintiff's damage. As an award by the Commission is only *prima facie* evidence of the amount of damage, it follows that on the trial in the District Court the railroad may attack the amount, and, if the evidence show that the award is incorrect, the jury should follow the evidence and reject the award. We do not decide the question whether a plaintiff can recover more than the Commission awards, but undoubtedly the railroad may prove that the sum is too large. As the verdicts here demonstrate, the jury did not follow the orders of the Commission, and it seems to us therefore that,

> even if the awards be calculated on the wrong theory, the plaintiffs have not recovered on this theory, but on other evidence, and are not to be charged with the Commission's possible mistake. In the Jacoby case the jury repeated the Commission's mistake precisely, and in this respect the case before us appears to be materially different, for the jury here has rejected the Commission's calculation, and has reached a different result."

It is quite true that there are the differences pointed out by the Circuit Court of Appeals; but it is impossible to perceive how these differences cure the errors of the trial Judge. The "other evidence" offered by the plaintiffs did not tend to show the *correct amount of tonnage* which they were entitled to ship under the Commission's rule. On this point the only evidence offered was the finding of the Commission. But even if there had been other evidence than the finding of the Commission on this point, plaintiff in error nevertheless would have been entitled to the instruction requested which dealt with the evidential value of the finding of the Commission, in view of the erroneous basis upon which this finding was rested.

The fact that the verdicts rendered by the jury were less than the awards of the Commission does not rectify the error, since in the absence of dependable evidence as to the *amount* of tonnage which the plaintiff had been prevented from shipping the jury was not entitled to *guess* at this amount. Moreover, it by no means follows that because the verdict was less than the Commission's award, it should be assumed that the jury were not controlled in arriving at the number of cars which the defendant in error should have received by the Commission's finding. On the contrary, it ought to be presumed that the jury in the absence of proper instructions bearing on this point did not guess at the number of cars which the defendant in error should have received, but based their verdict upon the

finding of the Commission, and that their lower verdict was due to the fact that they used a higher mining cost than the theoretical one of 88 cents which the Commission adopted in arriving at the amount of its award.

The reasons, therefore, which induced the Circuit Court of Appeals to refuse to apply the principle determined in the Jacoby case to the present cases would seem to be wholly unsubstantial.

The analogy between the present case and the Jacoby case is, we submit, complete.

In the present cases and in the Jacoby case it was incumbent upon the respective plaintiffs to introduce testimony from which the jury could find the number of cars which they should have, but had not, received.

In the Jacoby case to sustain this burden the plaintiff put in evidence a finding of the Commission to the effect that the plaintiff should have received so many cars, and introduced no further testimony in chief on this point.

In the present cases precisely the same course was pursued by the plaintiffs, the only testimony introduced by them in chief being a finding of the Commission that so many cars should have been received by them in excess of those which had been received.

In the Jacoby case to overcome the effect of the Commission's finding which had been put in evidence and to discredit or destroy its evidential value, the defendant put in evidence a compilation or statement which had been submitted to the Interstate Commerce Commission by the plaintiff, which purported to show the number of cars which certain mines located on the line of the defendant had received in the period of the action and the percentage relation between the aggregate capacity of these cars and the aggregate capacity or rating for car distribution purposes of the mines at which they had been placed, and they followed this by testimony that the percentage relation between the capacity of the cars which the Commission found Jacoby should have received and the capacity or rating of his mine corresponded exactly with the relation between

the capacity of the cars and the capacity of the mines which had been embraced in the statement submitted.

In the present cases the defendant pursued precisely the same course as that which had been pursued in the Jacoby case. It put in evidence a statement which the plaintiffs in the proceedings before the Commission had submitted as the basis of their claim, which showed the aggregate number of all cars placed in the region in which their mine was located and the percentage relation between the capacity of these cars and the capacity or rating of the mines at which they had been placed, and the introduction of this statement was followed by testimony showing that the percentage relation between the capacity of the cars which the Commission found the plaintiffs should have received and the capacity or rating of their mine was exactly similar.

The point presented in the Jacoby case, which this Court said should have been granted finds its true counterpart in the points submitted in this case on behalf of the Railroad (*supra*, page 47).

If there was evidence, and there undoubtedly was, from which the jury would have been justified in finding that the Interstate Commerce Commission had ascertained the number of cars which the plaintiffs should have received in the manner referred to in the point (and the evidence that they had thus determined the number was uncontradicted) and, if such method was an erroneous one (and we do not understand that it is now contended that the plaintiffs were entitled to a percentage of the aggregate of all the cars placed in the region because these included individual and fuel cars, to none of which the plaintiffs were entitled), then it would seem inevitably to follow that the decision or ruling of this Court in the Jacoby case is directly applicable and controlling.

That this was the view of the trial Judge is evidenced by the action which he took in Clark Brothers Coal Mining Company *vs.* The Pennsylvania Railroad Company, *supra*.

The Circuit Court of Appeals has, we respectfully submit, fallen into error in assuming that any other testimony than

the finding of the Commission was introduced by the plaintiffs which would have enabled the jury to determine the number of cars to which the plaintiffs were entitled under the rule of distribution laid down by the Interstate Commerce Commission. The plaintiffs introduced no testimony whatsoever which would have enabled the jury to determine the number of *distributable* cars which the plaintiffs should have received. There was some testimony which showed the number of cars which another operator had received, but that this did not tend in the remotest degree to establish the number which the plaintiffs were entitled to is settled by the decision of this Court in the Jacoby case. The Railroad introduced testimony with respect to this feature of the case, the testimony of Mr. Twose alluded to above (*supra*, page 37); but the Court refused to instruct the jury with respect to the significance of this testimony and in fact it is in large measure the treatment accorded this testimony by the Court which the Railroad complains of as constituting error.

As to the second ground of differentiation between the Jacoby case and the present cases, viz., the difference between the amount of the Commission's award and the verdict in the present cases and the exact correspondence between the two in the Jacoby case, it should not, we submit, have the effect given to it by the Court.

In the first place, if it be true, as we submit it is, that there was no evidence at all from which the jury could determine the number of cars to which the plaintiffs were entitled, if the award of the Commission was not evidence of this, then no verdict in favor of the plaintiffs was justified. And even if this is not the case and there was other evidence, nevertheless, the defendant was entitled to the benefit of an instruction that, if they found that this finding was based upon an erroneoeus method of ascertaining the number of cars to which the plaintiffs were entitled, they should ignore this finding in arriving at their conclusion.

Moreover, the variance in the present cases between the amount awarded by the Commission and the verdict of the

jury is deprived of all significance when it is considered that the amount of the verdict is no evidence that the jury ignored the Commission's finding as to the number of cars which should have been delivered to the plaintiffs, because this finding may have been accepted and adopted and the Commission's award may not have been accepted because of the testimony adduced tending to show that the Commission, in arriving at the profit which the plaintiffs would have made on the coal which they were unable to ship, had seriously underestimated the cost of producing the same.

It is proper to point out also that in the Clark Brothers case, tried before the same trial Judge shortly after the trial of these cases, there was a large amount of evidence introduced by the plaintiff, in addition to the report and order of the Interstate Commerce Commission, and the verdict rendered was for the face value of the claim without interest, which made a reduction of about one-third in the sum which would have been recoverable if the jury had allotted the full amount of the Commission's award with interest. This is just about the reduction made by the jury in these cases. It follows, therefore, that in the two matters which the Circuit Court of Appeals refers to as distinguishing this case from the Jacoby case the Clark Brothers case was an exact parallel. Notwithstanding this, the trial Judge, as heretofore stated, ordered a new trial because, as indicated in his opinion (238 Fed. 642) the decision of this Court in the Jacoby case, in his judgment, required it.

Furthermore, counsel respectfully but earnestly insist that the suggestion in the opinion of the Circuit Court of Appeals that this contention was waived results from a misapprehension.

In connection with the discussion of the points submitted by both sides, the trial Judge, Judge Dickinson, announced that he did not intend to make a specific answer to each point, but that he purposed to deal with the case comprehensively in his charge and then to state at the end of his charge that, so far as the points were affirmed, by the instructions in his charge, they were affirmed, and, in so far

as they were refused by the instructions in his charge, they were refused. This procedure was followed, as appears at the conclusion of the charge, at page 302 of the Record, where the Court says:—

> "I think I have gone over the subject matter of the different points submitted to me. So far as they are affirmed in the general charge, they are affirmed; and so far as not affirmed in the general charge, they are disaffirmed, and counsel, if they choose, may call my attention to any specific point which they would like to have specifically answered."

As readily appears from a reading of the charge, the trial Judge disagreed with the theory of defendant's counsel with respect to the points under discussion and intended to refuse them, and there was no reason, therefore, why counsel should have called his specific attention to the points relating to this feature of the case in order that he might announce such refusal; particularly in view of the initial statement made by the Court that he did not intend to answer the points specifically, and in view also of the generally approved practice not to read to the jury points which are refused. Due exceptions were taken, as appears on page 304 of the Record, as follows:—

> "Counsel for the defendant except to the refusal of the learned trial Judge to charge as requested by them in such points as were not affirmed."

The refusal of these points was included as one of the grounds for the Railroad Company's motion for a new trial; but an additional reason was assigned, viz., that the Court's charge was inadequate in failing to discuss the testimony of Mr. Twose—the testimony as to the inaccuracy of the Commission's award. Even, on the theory of the trial Court, the Railroad was entitled to have this feature of the case explained to the jury, and this the Court had entirely omitted to do—through inadvertence as he has stated.

In his first opinion denying the Railroad Company's motion for a new trial, he says, with respect to the 16th reason for a new trial which dealt with this matter (Record, page 326):—

> "The remaining sixteen reasons are really duplications of those discussed (being stated separately in each case), except the sixteenth. This complaint has a real basis. We would not, however, feel justified in subjecting the parties to the delay and expense of a new trial because of the inadequacy of the charge in this feature. The reason is this: The testimony referred to was that of an intelligent and fair witness with a firm grasp of the facts to which he testified. These were all book-keeping or mathematical facts, as he had no knowledge except that derived from the figures submitted to him. The trial Judge had in mind the definite purpose to advert to this testimony and its application to the case, but he was diverted from this purpose and it was forgotten. Counsel for defendant were in no way responsible for this lapse and their client should not suffer for it. Nevertheless, the fact is they did not call attention to the oversight. Neither was it the fault of the plaintiffs and they are in no default and the loss should not fall on them."

Clearly, therefore, the trial Court did not intimate that there had been any waiver on the part of the Railroad Company of the position taken by it, except as to this complaint *that the charge was inadequate* in the matter referred to. But to make assurance doubly sure, counsel for the Railroad Company called his attention to the danger of a misunderstanding of the language used, and he at once indicated that he had not intended to create the inference that there had been any waiver of the position taken by the Railroad Company *in its points* and expressed his entire willingness to file a supplemental opinion, which he very promptly prepared and filed on November 8th, 1916. This opinion appears on pages 327 to 329 of the Record, and is,

it is submitted, conclusive confirmation of the correctness of the Railroad's contention that it in no respect waived any of the positions covered by its points.

The Court's attention is respectfully called to the following paragraph of this supplemental opinion on page 328 of the Record:—

> "The other error was the inadequacy of the charge in the respect that it presented to the jury the evidence of the amount finding of the Commission, but their attention was not called to the testimony of the witness for the defendant. In saying that the defendant had waived specific answers to the points referred to, we meant merely that the charge of the Court was intended and accepted as an answer to these points, affirming them so far as the charge was in accord with them, and disaffirming them otherwise. We did not mean to imply that counsel had abandoned in any degree the contention of the defendant."

Furthermore, it should be noted that the Record shows on page 304 that an exception was noted for the defendant by direction of the Court because of the refusal of the trial Judge to charge as requested by defendant's counsel in such points as were not affirmed; and, as appears on page 307, an exception for the defendant was also noted by direction of the Court because of the defendant's complaint of the inadequacy of the Judge's charge. It is difficult to believe that the Court would allow an exception to the defendant if in the Court's opinion the defendant had waived the points with respect to which the exception is allowed.

4. INTEREST.*

The Railroad Company also claims that no interest should be allowed on the amount demanded. The original claim as stated in the Commission's findings was the exorbitant sum

* This point is covered by specifications of error Nos. 5, 8, and 9, in case 293, and specifications of error Nos. 5, 14 and 15, in case 294.

of $155,401.59. The Commission awarded less than one-third of this amount, even on a basis which, as has been shown, was clearly excessive. The jury cut down the principal amount of the Commission's finding by $15,000. Under these circumstances, it is respectfully submitted that there is no proper basis on which interest can be claimed.

Thus in the case of Stevenson *vs.* Ebervale Coal Company, 203 Pa. 316 (1902), where the plaintiff claimed $100,000 and recovered $21,000, the Supreme Court of Pennsylvania, referring to the exorbitant demand which had been made, said (page 333):—

> "The jury should have been peremptorily instructed, that under these circumstances damages for detention, not to exceed legal interest, should not be allowed; that they had no discretion in the matter."

See to the same effect, Pierce *vs.* Lehigh Valley Coal Co., 232 Pa. 170 (1911). In this case, the Court says on page 172:—

> "The right to compensation for delay in the payment of damages arising out of a *tort* depends upon the circumstances of the case. It is, therefore, usually a question for the jury under the evidence submitted. If the fault, in non-payment of the claim rests with the defendant, he cannot complain if he is required to compensate for the delay. If on the other hand the fault lies with the plaintiff by reason of an excessive and unconscionable demand, one which the defendant is required to protect himself against by litigation, he should not be penalized for the unwarranted conduct of the plaintiff and required to pay damages for the delay in the settlement of the claim. The Court should so instruct the jury, and if they disregarded the evidence and wrongfully return a verdict awarding compensation for the delay, the Court should set aside that part of the verdict where the amount can be ascertained, and if it cannot be ascertained the entire verdict should be

set aside and a new trial awarded. If it is clearly developed on the trial of the cause that the claim is extravagant and unreasonable and warranted the defendant in resisting payment, the Court should direct the attention of the jury to the evidence with instructions that if it is credible the plaintiff would not be entitled to recover compensation for the delay."

See also in support of the same proposition:—

Trustees of Kingston *vs.* Lehigh Valley Coal Co., 241 Pa. 469 (1913).

The learned trial Judge not only permitted the jury to award interest from the date of the Commission's award, *but from a date almost five years antecedent thereto,* when the plaintiffs were claiming three times as much as the Commission awarded. In this connection it is to be remembered that had the Railroad acceded at any time during these five years to the unconscionable demands of these plaintiffs, it would, in the light of the Commission's findings, even if they were correct, have been guilty of an undue preference in violation of the provision of the Act to Regulate Commerce.

5. Award of Counsel Fees.*

In case No. 293, relating to the first period, the learned trial Judge awarded a counsel fee of $3250, while in case No. 294, relating to the second period, he awarded $6750. In doing this, he confessedly took into view the services rendered by counsel before the Interstate Commerce Commission. While he professes to exclude an allowance on account of proceedings before those taken in Court (Transcript of Record, page 330), the following paragraph of the opinion filed in connection with the allowance of these fees

* This point is covered by specifications of error Nos. 12, 13 and 14, in case Nos. 293, and specifications of error Nos. 18, 19 and 20, in case No. 294.

(Transcript of Record, pages 330 to 332) clearly indicates that the fee was made with reference to the services of counsel before the Interstate Commerce Commission as well as in connection with the institution and prosecution of the present action, and that it was not restricted to the services of counsel rendered in connection with the initiation and prosecution of the case in the District Court. Of course, it is settled that no fee is payable under the act because of the services of counsel before the Commission: Meeker *vs.* L. V. R. R. Co., 236 U. S. 412 (1915), at pages 432 and 433. The evident purpose of the statutory provision, the Court says, is to charge the carrier with the cost and expenses entailed by its failure to pay without suit (see also Mills *vs.* L. V. R. R. Co., 238 U. S. 473-1915). If, however, the trial Court is permitted to take into view the services rendered before the Interstate Commerce Commission in determining the compensation to be paid on account of services in the District Court, it is manifest that the rule established by this Court is evaded. Furthermore, the purpose of the rule, as outlined by this Court in the Mills case, is to place upon the Railroad Company the burden of the cost of litigation after the case passes the Interstate Commerce Commission if the railroad ultimately loses, and this clearly implies that the Railroad Company should only be required to pay such counsel fees as might reasonably be charged by counsel for the defendants in error to their clients for services in the District Court in addition to the fees properly chargeable if the case had never been carried beyond the Commission. Obviously, the procedure of the learned trial Judge runs directly counter not only to the rule of law, but also to the purpose which lies back of it.

Furthermore, the trial Judge is without the requisite knowledge to enable him to determine what the amount of the fee is to be if it is to be predicated in any way on the services rendered before the Interstate Commerce Commission. Since he was not present at the hearings before that tribunal, and has taken no evidence of the time and labor involved in the preparation of the case, the rule suggested

by him would result in the fixing of a fee without evidence upon which to base it. This could never have been contemplated by the statute.

Finally, it is respectfully submitted that in any aspect the fee is excessive for the services rendered in the District Court, even taking into consideration the preliminary services before the Interstate Commerce Commission.

HENRY WOLF BIKLÉ,
FREDERIC D. McKENNEY,
FRANCIS I. GOWEN,
For Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1918. NOS. 293 AND 294.

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

James H. Minds, Surviving and Liquidating Partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, Defendants in Error.

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

James H. Minds and Julia A. Matz, Co-partners trading as Bulah Coal Company, Defendants in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR DEFENDANTS IN ERROR.

COUNTER STATEMENT OF THE CASE.

During the period of the action from June, 1902, to June, 1907, the Bulah Coal Company operated a mine known as Webster No. 4, in the County of Clearfield, State of Pennsylvania. The Bulah Coal Company was a copartnership, composed of James H. Minds and William J, Matz. William J. Matz died in April, 1904, testate, leaving to survive him his widow, Julia A. Matz, as executrix and sole legatee under his will. The action originally begun before the Interstate Commerce Commission was brought in the name of the Bulah Coal Company, but on account of the death of William J. Matz it was divided into two periods. During both periods coal was produced from but the one mine, to wit, Webster No. 4.

On the twenty-eighth day of June, 1907, the proceedings were begun before the Interstate Commerce Commission, and as a result of the hearing and a rehearing for further argument the Commission handed down certain findings of fact and reparation awards covering both periods of the action. On February 7th, 1913, two petitions were filed in the United States District Court for the Eastern District of Pennsylvania, bringing suit upon the awards in both periods of the action. Through an error the docket numbers and the amounts of the wards in the two cases were erroneously transposed. On November 9th, 1915, both cases were called for trial and consolidated by agreement of counsel. A jury was empannelled and the testimony of both sides formally presented. Respective counsel argued the case to the jury, and after arguments the trial Court discovered the erroneous transposition. At this time it was suggested that an immediate amendment be made and the cases submitted to the jury under one charge for verdict. The Railroad Company objected, a juror was withdrawn and the case continued. The cases were again called in said Court on October 9th, 1916, and were again consolidated for trial. The Coal Company offered in evidence the award of the Commission, and also read in the Record the testimony of James H.

Minds and Elias C. Davis, witnesses who had an intimate and direct knowledge of the subject matter involved.

The Railroad Company produced three witnesses, all of whom testified largely upon the assumed state of facts from figures, statements and records furnished them by the Railroad Company. This testimony of the Railroad Company was offered for the purpose of contradicting the testimony of the Coal Company.

The Railroad Company admitted its liability to the Coal Company, in both periods of the action, but attacked the evidence produced by the Coal Company in but one feature, involved in the first period, and that was the question of the hypothetical cost of production, provided the Coal Company had received a non-discriminatory supply of cars under its rated capacity.

In the second period the Railroad Company admitted its liability for discrimination in the amount of 25,865 tons, but contended that the tonnage upon which the Commission had made its calculations was erroneous alleging that the Commission had disregarded its own rule of distribution. The Railroad Company did not offer in evidence any formal rule of distribution, authorized by the Commission, but relied upon the Commission's discussion of what the proper rule should be in an opinion filed in another case. The cases were submitted to the jury, which found a verdict in favor of the Coal Company of $10,990.11, with compensation for delay, for the first period, and $22,958.10, with compensation for delay, for the second period, the aggregate total of these verdicts being exactly $16,358.84 less than the aggregate amount of the awards sued upon.

ARGUMENT.

That the Coal Company was unduly discriminated against by the Railroad Company in the distribution of coal cars, cannot be controverted. It is the law of the case, and, therefore, the adjudicated premises upon which the instruc-

tions of the Court and deductions of the jury under the testimony must be based. The plaintiff in error stands convicted of an undue and unjust discrimination against the defendants in error by reason of the enforcement of the rule of the plaintiff in error then in effect regulating the distribution of coal cars. The plaintiff in error, as a matter of fact, does not deny that the defendants in error are entitled to recover damages in both periods of the action, but contends that the verdicts rendered by the jury are excessive in amount.

There is substantive merit in the defendants in error's case. That the Coal Company has been wronged by the Railroad Company is admitted, but nowhere in the Record is there a scintilla of testimony of any amount ever tendered by the Railroad Company to the Coal Company as compensation for the damages sustained many years ago by the Coal Company by reason of the Railroad Company's undue and unjust discrimination against them in giving cars. It must be remembered that the Coal Company since June 28th, 1907, sought redress for its wrongs. The Railroad Company, ably represented by counsel, opposed the contention of the Coal Company and after considerable testimony taken on both sides, the Interstate Commerce Commission on August 18th, 1910, ordered:—

> "That the said rule, regulation and practice of the defendant in that behalf unduly discriminates against the complainant and other coal operators similarly situated, and is in violation of the Third Section of the Act to Regulate Commerce."
>
> (Page 37, Transcript of Record.)

No order for reparation was made at this time, and further argument was directed by the Commission (Transcript of Record, page 35). Again the Railroad Company had another opportunity to enlighten the Commission along the lines defended by it in the cases at bar. Following argument on March 11th, 1912, the Commission handed down reparation orders awarding to the defendants in

error during the first period the sum of $18,591.48, with interest thereon at the rate of six per cent. per annum from June 28th, 1907, and for the second period the sum of $31,715.57, with interest thereon at the rate of six per cent. per annum from June 28th, 1907. As a result of suits brought in the District Court on these awards, the juries returned a verdict of $10,990.11, with interest from June 28th, 1907, covering the first period, and $22,958.10 covering the second period. Regardless of interest, which runs concurrently with the awards and at the same rate, and beginning with the same period of time, the verdicts reduced the amounts awarded in a total aggregate of $16,358.84, as the following statement indicates:—

Amount of award, first period		$18,591.48
Amount of award, second period		31,715.57
		$50,307.05
Verdict, first period	$10,990.11	
Verdict, second period	22,958.10	
Total deductions on awards	16,358.84	
	$50,307.05	

1. RIGHT OF DEFENDANTS IN ERROR TO AMEND.

To deny the right to amend for the purposes of correcting formal defects and inadvertent mistakes would impart a rigor to the law incompatible with the spirit of justice that animates our Courts in the impartial performance of their high duties. To allow amendments is the rule; to refuse, the exception. Liberality in the allowance of amendments largely prevails, and the tendency of the Courts to exercise their discretion in this regard is daily becoming broader in scope and more elastic in purpose. The defendants in error operated the same mine at two different but consecutive periods. For the purposes of trial both cases were consolidated. As stated in the petition to amend, the changes made and allowed by the Court introduced no

new cause of action, involved no new person or persons, claimed no new amount or amounts of damage, but merely substituted one amount and docket number for the other, as the record plainly shows. It might be pertinent to say that at the first trial, so immaterial and slight was the technical error or variance that neither the counsel for the Railroad Company nor for the Coal Company detected it. After all the evidence was in, and the closing arguments to the jury had been made on both sides, the trial Judge discovered the error, advised counsel of the same, and it was suggested that an immediate amendment be then and there allowed. The counsel for the Railroad Company objected to the proposed allowance and a mistrial resulted. After the amendments had been regularly allowed, the case was again called for trial. It was before the same Judge in the same Court, with the same attorneys participating on both sides, the record showing that "counsel agree that the two cases may be submitted to the same jury on the same testimony" (page 67 of the Transcript of Record). At the very opening of the case the trial Judge said to the jury:—

> "THE COURT:—Gentlemen of the jury, there are two cases being submitted to you. It is necessary for the reason given you that there be two cases, because the parties claimant are not precisely the same in each case, but each case grows out of the same transaction. The cases will be supported by the same evidence, by the same witnesses, so for the convenience of all concerned, we are submitting both cases to you at the same time, but when you come to make the awards you will separate them and render your verdict in each case as though that were the only case submitted" (Transcript of Record, page 67).

In its argument the plaintiff in error is compelled to state:

> "In these two cases, which were consolidated for the purposes of trial, the issues are so similar that it

has seemed not only practicable but desirable to discuss them in one brief" (Brief of Plaintiff in Error, page 22).

These two suits constitute only one cause of action. This cause of action was divided into two periods, the first thereof ending and the second thereof beginning with the date of the death of one of the partners. Without the amendment neither the Railroad Company nor the Coal Company would have suffered any injustice, and it is submitted that with the amendment allowed their status in this regard is not changed. The Bulah Coal Company, was originally comprised of James H. Minds and William J. Matz. William J. Matz, one of the partners, having died, his widow, Julia A. Matz, being executrix and sole legatee under his will, continued the partnership with James H. Minds. The plaintiff in error makes much ado in its contention that the proposed amendment introduced a new cause of action in contravention of the last sentence of paragraph 2 of Section XVI of the Act to Regulate Commerce, which states "that a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court or the State Court within one year from the date of the order and not after." The case of Phillips & Company *vs.* The Grand Trunk Western Ry., 236 U. S. 662 (1915), is quoted in support of this position. In this case a lumber association petitioned the Interstate Commerce Commission for its determination as to the reasonableness of an advance in freight rates on lumber. Its petition was filed July 24th, 1903. It was held that the advance was not warranted, and that the resultant increase was unreasonable and unjust. The action of the Commission was sustained by the Circuit Court, and on May 27th, 1907, its ruling was affirmed by the United States Supreme Court. *Nearly two years after the ultimate decision rendered by the United States Supreme Court,* the plaintiff in the case noted by the plaintiff in error brought suit in a Circuit Court for the recovery of the overcharge. One of the basic allegations in the plead-

ings was that the Commission on complaint of the lumber association, to which Phillips and Co., the plaintiff, was a total stranger, had found the overcharge to be unreasonable. The United States Supreme Court held under these facts that the lapse of time was fatal to the claim of the plaintiff. In the case cited, plaintiff could have protected his rights in any one of three ways: he could have filed a complaint; interevend in the petition already filed by the association; or, if in time, persented his claim and awaited the result of the litigation over the validity of the order. His main difficulty was that he presented no petition whatever within the time limit. Our petitions were filed in the District Court within the statutory time, and they were both filed upon the same day. They were based upon companion reparation orders handed down together, grounded upon the same evidence. No new party was introduced. James H. Minds and Julia A. Matz were the only two persons interested, either in a personal or representative capacity before amendment, and they remained in identically the same capacity after amendment. Had the trial, at the time of withdrawing the juror, proceeded to verdict, and had the trial Judge or no one else discovered the technical misplacement of the figures representing the docket numbers and the amounts involved, no possible injustice arising from the unamended condition of the Record would have resulted to the plaintiff in error. In the event that this verdict had been obtained, and it came to payment of the same or satisfaction of the record, no other signatures to the release or satisfaction in either or both cases could be required than those of Julia A. Matz and James H. Minds. If the plaintiff in error today, in case the ultimate decision in these cases was against it, were required to pay the verdicts in either or both cases, again the only signatures necessary to fully release it in any event would be those of Julia A. Matz and James H. Minds. The interest of James H. Minds continues throughout both periods of the action, while by the death of William J. Matz, the other partner, his wife became his executrix and sole legatee. It has been well settled

that an amendment which merely explains or amplifies what was alleged in support of the cause of action, asserted in the original complaint, relates back to the action and is not affected by the intervening lapse of time. The change in the case at bar was in form and not in substance. It introduced no new party nor different cause of action, nor does it set up any different set of facts as the ground of the action. The changes made clearly were not of the essence of the cause of action, and could in no wise have prejudiced the defendant. The defendants in error can find no apter words in answer to the contention of the plaintiff in error than those contained in a happy comment made upon the questions of amendment and technical pleadings by Judge Caldwell, in the Circuit Court of Appeals, delivered in the case of McDonald *vs.* State of Nebraska, 101 Federal Reporter 182 (1900):—

> "There are in the history of the jurisprudence of every country certain epochs which mark the beginning of distinct trains of legal ideas and judicial conceptions of justice. There was a time in England and in this country when the fundamental principles of right and justice which Courts were created to uphold and enforce were esteemed of minor importance compared to the quibbles, refinements, and technicalities of special pleading. In that period the great fundamentals of the law seemed little, and the trifling things great. The Courts were not concerned with the merits of a case, but with the mode of stating it. And they adopted so many subtle, artificial, and technical rules governing the statement of actions and defenses—for the entire system of special pleading was built up by the judges without the sanction of any written law—that in many cases the whole contention was whether these rules had been observed, and the merits of the case were never reached, and frequently never thought of. Happily for mankind, and for the law itself, that epoch is past in England and in this country, and we now have an epoch in which substance is more considered than

form, in which the justice and right of the cause determines its decision, and not some technical error or mistake in the pleadings. In England today the amendment complained of in this case would be allowed quite as a matter of course, and the suggestion that the defendant had gained some advantage by the mistake would not be entertained for a moment. There, as here, every error or mistake in the pleadings which does not affect the substantial rights of the adverse party may be cured by amendment; and what is meant by substantial right is a right going to the actual merits of the case. Such a right is not acquired by a mistake or error in pleadings which has not misled the other party to his prejudice. And the prejudice must be actual and irreparable, and not merely theoretical. At this day the party who seeks to profit by an error or mistake in pleading must be able to invoke the principle upon which the law of estoppel is founded. And the emotion of surprise, once so assiduously cultivated by lawyers, has lost its virtue. Extreme sensitiveness to that emotion no longer avails to turn a suitor out of Court, or to delay justice."

In the case of Samuel D. Hall *vs.* The Pennsylvania Railroad Company, brought in the Court of Common Pleas No. 5, of Philadelphia County, No. 4858, June Term, 1906, and upon appeal to the Supreme Court of Pennsylvania, thereafter having been formally heard and then reargued, the Court in 257 Pa. 54 held that where plaintiff claims $100,000 damages as excess charges on coal shipments in violation of constitution and statutes passed in pursuance thereof, and subsequent amendment alleged acts were in violation of constitution and statutes, and "particularly Act of June 4th, 1883, P. L. 72," which relates to treble damages, an amendment offered more than six years after cause of action arose claiming treble damages, does not introduce new cause of action, since first amendment referring to the Act of 1883 was sufficient to notify defendant that action

was brought to recover penalty imposed thereby, though no express claim for treble damages was made.

As to allowance of amendment six years after cause of action and three years after the date of beginning of suit, see Puritan Coal Mining Company *vs.* The Pennsylvania Railroad Company, 237 Pa. 423, vide 460.

That the Court below was amply justified in allowing the amendment is sustained by Section 954 Rev. Statutes of the United States, Federal Statutes Annotated, Vol. 4, page 596:—

> "No summons, writ, declaration, return process, judgment, or other proceeding in civil causes, in any Court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such Court shall proceed and give judgment, according as the right of the cause and matter in law shall appear to it, without repairing any such defect, or want of form, *except those which,* in cases of demurrer, the party demurring specially sets down, together with his demurrer as the cause thereof; and such Court shall amend every such defect and want of form other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleading, upon such conditions as it shall, in its discretion, and by its rules prescribe."

Purpose of the section:

The jurisdiction has been conferred by Acts of Congress upon the Court of the United States, so as to supervise the various steps in a cause to prevent hardships and injustice, and that the merits of a cause may be fairly tried.

> Eberly *vs.* Moore (1860) 24 How. U. S. 147;
> *In re Glass* (1902) 119 Fed. Rep. 509.

The Circuit Court of Appeals, in passing upon this specification of error, said (Transcript of Record, page 345):—

> "As we understand, however this position is not much relied on, and in any event we see no reason to say anything about it except to approve the action of the District Court in setting right what was a plain and harmless mistake. Its correction did the Railroad no possible injury."

In addition to the Phillips case the plaintiff in error has cited four cases (Brief of plaintiff in error, page 25), to support its contention that the District Court erred in allowing the original petitions in this case to be amended:—

> Georgia, etc. Ry. *vs.* Blish Co., 241 U. S. 190 (1916), at page 197;
> M. K. & T. Ry. Co. *vs.* Ward, 244 U. S. 383 (1917), at page 388;
> U. S. *ex rel.* Louisville Cement Co. *vs.* I. C. C., 246 U. S. 638 (1918): cf.;
> B. & O. *vs.* Leach, No. 132, Oct. T., 1918, decided Mar. 10, 1919.

A careful examination of these cases fails to show that in any instance the question of amending the record was before the Court; and it is therefore submitted that they have no bearing whatever on the question in the case at bar as to the right of the District Court to correct an error in the pleadings, the allowance of which could work no possible harm to the plaintiff in error.

2. INSTRUCTIONS GIVEN BY THE COURT WERE FAIR, ADEQUATE AND PROPER AS TO AVERAGE COST OF PRODUCTION.

The contention of the plaintiff in error in reference to the average cost of production which would have been incurred had the defendant in error been furnished with the additional cars to which the Commission found they were entitled, is without merit. The plaintiff in error admits upon a proper construction of its own evidence alone that in neither period of the action did it give the defendants

in error the number of cars to which they were entitled under the law of the case. This implies also the further admission, as a matter of fact, that the defendants in error were entitled to a verdict in both periods. The only remaining question undecided was the amount of the verdict in these cases.

In the first period, it is admitted that the Commission's figure of 9523.68 lost tons is correct, the only disputed question being the cost.

> "MR. BIKLE:—In the first period we do not dispute the lost tonnage, only the cost. * * * ." (Record, page 303.)

Having in mind that the lost tonnage and average selling price of coal are not in dispute during the first period, the defendants in error submit that the hypothetical cost involved is solely for the jury. The charge of the Court was so fair and adequate on this question and applies to both periods that we feel constrained to quote a portion of it:—

> "Now, the next question is what did it cost to produce. There is the controversy between these parties. That is the fact, the simple fact, which you are to decide. During that period, 1902 to 1904, what was the fair cost for producing this coal? The plaintiff says it was eighty-eight cents, and they point to the evidence—and I do not care to take the time to go over it, because it is unnecessary; it has been fully and ably discussed by counsel, and that argument was addressed to you by the plaintiff for the purpose of convincing you that the fair cost of the production of that coal during that period was 88 cents a ton. If it was, then the difference between $1.598 and 88, or 71.8 cents is the profit, and if that is the right figure, then of course every man's common sense would tell him to just multiply that by 3,878.4 tons, and you would have that element of damage resulting in $2,784.41.
>
> "Now, of course, gentlemen, in every case you are not done with it when you hear one side. You get

that one clearly in your minds. That is perfectly simple and perfectly clear, and that the question for you to consider is 'What was the fair cost of producing this coal? I have given you what the plaintiff says about it. Now, the defendant says that that is too low; that it could not have been produced for that; that they could not have received as large a profit as 71.8 cents on every one of these tons. That it would have been less than that; and they say—and that was the purpose of calling Mr. Hatfield as a witness before you—he says that the fair cost instead of being 88 cents was $1.19, and while it is admitted that there was a profit, and admitted that there was a damage, the profit and consequent damage was not 71.8 cents but it was 40.8 cents a ton, and the plaintiff is entitled to only the profit in this feature of the case, then of course the damage would not be 3878.4 tons multiplied by 71.8 cents, but it would be 3878.4 tons multiplied by 40.8 cents, and the amount would be $1582.22 as against $2784.41. I think, gentlemen, that that is clear." (Record, pages 294-295.)

To assert that the portion of the trial Judge's charge, quoted on pages 33 and 34 in the Argument contained in the Brief of the Plaintiff in Error, had a tendency to or did allow the jury to discard the actual evidence adduced and award damages practically for discrimination in irregularity of car supply, absolutely distorts the fair meaning of the quotation, which makes no reference to the question of discrimination at all. It was perfectly proper for the Court to state to the jury that an irregular supply of cars for coal shipment made the actual cost of production higher per ton than would a regular supply under similar labor conditions, as bearing on a material feature of the case which the jury had to find from the evidence, to wit, the actual cost of production in both periods under an admitted discriminatory supply of cars. The Court also had before it the testimony of James H. Minds and Elias C.

Davis, which was read into the record, corroborating the force of the evidence created by the admission of the findings and orders of the Commission. How similar is the plain meaning flowing from that portion of the trial Judge's charge quoted by plaintiff in error and the meaning that can be adduced from substantial testimony introduced by defendants in error from the findings of the Commission:—

> "'(e) That the cost of production at the complainants' mine during the first period was $1.23 per ton on the average, and during the second period $1.08; that the cost of production would have been 88 cents per ton during both periods if a non-discriminatory share of the car supply had been received, and that the excess in the actual costs of production of the coal mined and shipped to interstate destinations resulting from the discrimination in the car supply was therefore 35 cents per ton during the first period and 20 cents during the second period.'" (Record, pages 72, 73.)

The defendant in error might reasonably complain of the inadequacy of the Court's charge so far as the testimony of James H. Minds and Elias C. Davis is concerned. The testimony of these witnesses was not only highly corroborative of the orders and findings of the Commission in certain essentials, but the testimony of Mr. Davis, if believed, would have warranted the jury in finding that instead of twenty-two days constituting an average working month, the mine could have worked twenty-six days per month, and that the hypothetical cost would have been 83 cents instead of 88 cents for both periods.

> "MR. ROADS:—What is your business?
>
> "MR. DAVIS:—Bookkeeper and shipping clerk.
>
> "MR. ROADS:—Shipping clerk for the Bulah Coal Company?
>
> "MR. DAVIS:—Yes, sir.
>
> "MR. ROADS:—How long have you occupied that position?

"MR. DAVIS:—About eighteen years.

"MR. ROADS:—Did you make a table, computed from data that was kept by you, in regard to the capacity of the Bulah Coal Company's operation at Webster No. 4, showing the number of working days, the capacity at all times based upon 16 cars rating per day, showing the actual output, the loss in tons, the average price of coal, the average cost of production, the loss per ton, and the total loss between 1902 and June, of 1907?

"MR. DAVIS:—Yes, sir.

"MR. ROADS:—This statement was made up by you from data made by you and kept in the books of the Company, books under your charge, and kept by you?

"MR. DAVIS:—Yes, sir.

"MR. ROADS:—Now, take up the first item under date of July 26th, 1902. You give there the capacity at full time as 560 tons per day, at 16 cars, 35 tons each, as 14,560 tons. That covers the monthly capacity of the mine, does it not?

"MR. DAVIS:—Yes, 26 working days.

"MR. ROADS:—Now, the actual output you give as 8234 tons. Where did you get that data?

"MR. DAVIS:—From the coal mined and shipped.

"MR. ROADS:—What do you call that book you keep that record in?

"MR. DAVIS:—It was taken from the payrolls and number of tons mined.

"MR. ROADS:—Have you got those books with you?

"MR. DAVIS:—Yes, sir.

"EXAMINER BROWN:—Do you sell run-of-mine coal?

"MR. DAVIS:—That is run-of-mine.

"EXAMINER BROWN:—Some of it did go as slack?

"MR. DAVIS:—No, sir; all run-of-mine.

"EXAMINER BROWN:—When you got what your payrolls showed you had what was actually shipped?

"MR. DAVIS:—Yes, sir.

"MR. ROADS:—My idea is to show how this first line of the statement is made up, and then make a general statement in regard to all of them.

"EXAMINER BROWN:—That they were made in the same way?

"MR. ROADS:—Yes, sir. (Addressing the witness.) Now, explain to us how you got that actual amount of tonnage that was shipped. You have it under the head of actual output.

"MR. DAVIS:—The total number of tons mined and shipped that month. That was taken from the report of coal shipped daily.

"MR. ROADS:—The books show those entries you have given here?

"MR. DAVIS:—Yes, sir.

"MR. ROADS:—Now, then, the loss in tons, the next item. How do you arrive at those figures?

"MR. DAVIS:—That was the difference between the capacity at 16 cars of 35 tons capacity each, 560 tons per day, and the actual amount mined.

"MR. ROADS:—That represents, you say, the loss in tons, by taking the total capacity of the mines for the month and deducting ——

"EXAMINER BROWN:—You mean the rated capacity when you say total capacity?

"MR. ROADS:—Yes, the rated capacity. The difference between that represents this item of loss in tons, to wit, 6276 under the date of this item, July 26th, 1902. Now, you have fixed the average price of coal during the month of July, 1902, at $2.39. How do you make that up?

"MR. DAVIS:—That is taken from our shipping book.

"MR. ROADS:—Have you that in Court?

"MR. DAVIS:—Yes, sir.

"MR. ROADS:—Just refer to that shipping book, and tell us how you get at that $2.39 cost, give us the item?

"MR. DAVIS:—I took the various orders at various prices secured during the month, the month of July, as referred to in this data. One price was $2, another $2.10, another $2.15, another $2.25, another $2.35, another $2.50, another $2.60, another $2.65, and another $2.75. Totalling those and dividing by the number of prices given, I got an average price of $2.39.

"MR. ROADS:—And those prices are actual prices received from coal shipped, as appears from the book before you?

"MR. DAVIS:—Yes, sir.

"MR. ROADS:—Now, then, the next item is the average cost of production. You state that at 90 cents per ton. You reach that figure how?

"MR. DAVIS:—That was obtained by the total amount of the payroll for the month. The payroll, including mining and all labor and all expenses attached to the month's work to put this tonnage on the cars, and divide it by the tons mined and shipped.

"MR. ROADS:—That is from the actual cost.

"MR. DAVIS:—Yes, sir.

"MR. ROADS:—Have you a book there which that data was put in?

"MR. DAVIS:—Yes, sir.

"MR. ROADS:—What do you call that?

"MR. DAVIS:—That is called the payroll book. We keep the payrolls, and they are summed up at the end of the month. Say, two payrolls in a month.

"MR. ROADS:—Give us the figures from which that was made up?

"MR. DAVIS:—Payroll, first to 15th, $2721.61; payroll 16th to 31st, last half of July, $3791.16; royalty on coal $903.93; making a total expense for the month of $7416.70, divided by actual output, that is tons mined and shipped, 8284 tons, gives an average cost of 90 cents.

"MR. ROADS:—What would be the effect of a greater shipment of coal on the cost of production?

"MR. DAVIS:—On that same basis I figured that if we had shipped the capacity of the mine, the rated capacity of the mine being 14,560 tons, our cost would have been at the rate of 83 cents.

"EXAMINER BROWN:—Computed in the same way?

"MR. DAVIS:—Yes, sir.

"MR. ROADS:—Averaging it all the way through, say as near as you can tell, what is the cost of producing a ton of coal at Webster No. 4, since July, 1902, on say—suppose we make it on 8284 tons per month?

"EXAMINER BROWN:—That would be a matter of computation.

"MR. ROADS:—I think I have it exactly here, at 90 cents, that is about 80 or 90 cents, somewhere in there, generally speaking, and it varies, of course, with the shipments, the greater the shipment the less the cost of production per ton.

"MR. DAVIS:—Taking the 66 cent rate for mining, which was in effect from about April, 1903, to June, 1907, if we had worked the mines to about full capacity, we could have put the coal on the cars for about 81 cents.

"MR. ROADS:—That includes royalty does it?

"MR. DAVIS:—Yes, sir.

"MR. ROADS:—And any estimate for timber?

"MR. DAVIS:—Yes, sir.

"MR. ROADS:—What did you estimate for timber and royalty?

"MR. DAVIS:—Royalty was 10 cents, and about five cents a ton for timber, etc." (Record, pages 186-189.)

James H. Minds also testified that though rated at 560 tons, the mine had a capacity and facilities for shipping from 1000 to 1200 tons per day.

"MR. ROADS:—Didn't you have sufficient openings there to put miners at work so as to mine the coal?

"MR. MINDS:—Let me draw your attention to what you said, you said the capacity of the mines. The ca-

pacity of the mines ranges anywhere from 1000 to 1200 tons. I did not ship up to that.

"MR. ROADS:—I did not ask you about shipments. What I wanted to know was whether you did not have openings sufficient to put miners to work there to mine the full capacity of your tipples?

"MR. MINDS:—I certainly had.

"MR. ROADS:—What was the output capacity of your mine, say, in 1902?

"MR. MINDS:—Do you mean what we put out at that time?

"MR. ROADS:—No, I asked what was your output capacity?

"MR. MINDS:—The facilities for output?

"MR. ROADS:—Yes.

"MR. MINDS:—Anywhere from 1000 to 1200 tons.

"MR. ROADS:—That is per day?

"MR. MINDS:—Per day; yes, sir.

"EXAMINER BROWN:—Could you have loaded that much?

"MR. MINDS:—Yes, sir.

"EXAMINER BROWN:—You had that capacity on your tipples?

"MR. MINDS:—Yes, sir. You see, in the first place, the capacity of the mine is based on three things. The first is the territory, the coal, the second is rolling stock and the third is your tipple. I started in with all that, made all those preparations in the beginning when I started to open the colliery, and I maintained them up to the present day." (Record, page 180.)

This testimony plainly indicates that the defendants in error could have easily shipped the full rated capacity of their mines daily. These facts were all before the jury, and the credibility of each and every witness was absolutely for the jury, and we submit that the contention raised by the plaintiff in error in the second question involved, ignores the fact that the plain preponderance of testimony was with

the Coal Company and strongly supported the award and findings of the Commission.

The Circuit Court of Appeals, in passing upon this specification of error said (Transcript of Record, page 348):—

> "The Railroad complains, but we think without sufficient warrant, that the trial Judge erred in what he said to the jury in submitting the question, how much cost of mining would have been if the plaintiffs had received their proper share of cars. We think the instructions were sufficient and see no occasion to discuss them. Moreover, on this subject the evidence was conflicting, and, since the credibility of opposing testimony was involved, the Railroad was not entitled to binding instructions. The verdict on this point must be accepted as final."

3. UNDER ADEQUATE INSTRUCTIONS THE AWARD OF THE INTERSTATE COMMERCE COMMISSION AND ALL OTHER EVIDENCE AS TO COST OF PRODUCTION AND DISTRIBUTION OF CARS, WERE PROPERLY SUBMITTED TO THE JURY.

Regarding the third contention that the Commission in awarding damages in the second period of the action disregarded its own rule of distribution, we would say that this contention is rather an argument attacking the credibility of the award of the Commission as a matter of evidence, than as a matter of law for the Court. The same question arose in the trial covering the first period. It was just as essential to find the correct tonnage in the first as it was in the second period. We must conclude, for the defendant admits, that in the first period the Commission did not disregard its own rule. To sustain this statement and for the convenience of the Court we quote the following:—

> "MR. BIKLE:—In the first period we do not dispute the lost tonnage, only the cost. In the second period we dispute the correctness both of plaintiff's cost figures and also the tonnage. We ask that the Court so charge.

> "THE COURT:—Now, gentlemen, I want to make that clear. In the first period there is no question of the tonnage raised. The defendant concedes the amount of the tonnage, and the difference is all over the cost. So you need not trouble yourselves there with any other question than the cost question." (Record, page 303.)

It is inconceivable that a commission of eminent men with an efficient corps of accountants could have ascertained, by the application of its own rule of distribution, a tonnage indisputably correct in the first period of an action before it for adjudication, and then immediately err by applying another and different rule to the second period of the same action simultaneously under consideration with the first. Especially so is this the case when the Commission merely divided the one action into two periods, after the same had been brought, because of the death of one of the co-partners, handing down one opinion covering both periods and two supplemental opinions, awarding reparation at the one time. So closely related were these periods in their consideration and adjudication by the Commission that they bore consecutive docket numbers. The jury would be justified in inferentially finding that as the Commission's method in ascertaining the lost tonnage in the first period was admittedly correct, the second period, dealing with precisely the same commodity, shipped from the same mine, over the same railroad under like conditions, was likewise undoubtedly correct. That the Commission disregarded its own rule of distribution in the second period of the action, was argued before the jury. The jury in its deliberations upon this branch of the case was entitled to have the rule of distribution, prescribed or promulgated by the Interstate Commerce Commission, presented in evidential form for its consideration. The burden of doing this was upon the plaintiff in error and the query is, did the plaintiff in error assume the onus and offer in evidence the rule allegedly violated. In the Statement of the Case

(Plaintiff in Error's Brief, page 36), the rule of distribution of the Interstate Commerce Commission is stated and reiterated, although no page of the Record containing the same is quoted showing its offer and admission as evidence before the jury in the trial of the case. The statement of this rule in Plaintiff in Error's Brief and History of the Case will not avail the plaintiff in error if it were not before the Court and jury upon the trial of the cause. We submit that in the report and order of the Commission (Record, pages 235-283), while the question of the proper method of distribution is ably discussed and relevant opinions of appellate Courts quoted, no such rule as is set out in defendant's statement of the case or argument is promulgated as the Commission's rule of distribution, unless the discussion of what the proper rule should be can be construed as being the rule so explicitly stated by the plaintiff in error. It was not introduced as an exhibit, but the Court properly submitted the question to the jury under adequate instructions as to the effect of the award and all other evidence introduced in the cause. That the jury did not accept the award of the Commission in its entirety, plainly indicates that it gave due consideration to the testimony of Mr. H. H. Twose regarding the controversy arising upon the amount of lost tonnage, and also to the testimony of Mr. Hatfield upon the amount of the normal cost of production. If the testimony of these gentlemen and the contention of the plaintiff in error were disregarded, how is it possible to account for the fact that the jury rendered a verdict in the last period of only $22,958.10, instead of $31,715.57, the award of the Commission, being a difference of $8,758.47? This reduction may not seem at all substantial or sufficient to plaintiff in error, but to the elderly defendants in error, harassed by ten years of continuous litigation in seeking redress for discrimination, it comes with great force, and as a plain indication that the jury gave ample consideration to the testimony of Messrs. Twose and Hatfield.

The blueprint (Defendant's Exhibit No. 1) being a tabulation of the Railway Company's distribution sheets now

criticised by plaintiff in error was compiled at the direction of the Examiner of the Interstate Commerce Commission (Transcript of Record, pages 223, 4, 5) submitted to counsel for the Railroad Company and offered in evidence before the Interstate Commerce Commission without objection (Transcript of Record, page 112).

The plaintiff in error, in its eleventh assignment of error, complains that the Court should have affirmed the eighth point in the second period of the action as submitted. Bearing in mind the failure of the plaintiff in error to identify the rule of the Interstate Commerce Commission as quoted in its brief, with anything purporting to be the said rule, we submit that the Court had not sufficient evidence upon said rule upon which it could be justified in affirming said point, and without proper evidence of the rule itself, the point would be meaningless. Admitting, for argument, that the plaintiff in error had properly introduced in evidence the rule of the Commission, or showed the Commission's certification of a proper rule, the Court in its charge to the jury adequately protects the rights of the plaintiff in error in this regard, as will fully appear by reference to the charge of the Court in the following particulars:—

> "I think I have gone over the subject matter of all the different points submitted to me. So far as they are affirmed in the general charge, they are affirmed; and so far as not affirmed in the general charge, they are disaffirmed, and counsel if they choose may call my attention to any specific point which they would like to have specifically answered. * * *
>
> "MR. BIKLE:—In the first period we do not dispute the lost tonnage, only the cost. In the second period we dispute the correctness both of plaintiffs' cost figures and also the tonnage. We ask that the Court so charge.
>
> "THE CHARGE:—Now, gentlemen, I want to make that clear. In the first period there is no question of the tonnage raised. The defendant concedes the

amount of the tonnage, and the difference is all over the cost. So you need not trouble yourselves there with any other question than the cost question. In the second period the claim is questioned in two respects, the cost, as it is in the first period, and the tonnage is also questioned. So of course you cannot determine the amount of damage until you have settled both of those questions.

"I understand that the parties have agreed that their respective statements of their positions may be sent out in order to save the jury the labor of making calculations. Is that correct?

"MR. GLEASON:—Yes, sir.

"MR. BIKLE:—Yes, sir.

"THE COURT:—So, gentlemen, you will have the benefit of the figuring of the parties on each side, which will present these respective views. You will take the case and dispose of it. * * *

"Counsel for the defendant except to the refusal of the learned trial Judge to charge as requested by them in such points as were not affirmed.

"(Exception noted for defendant by direction of the Court.)" (Record, pages 302, 303, 304.)

The Court in an opinion *sur* rule in arrest of judgment and for a new trial, treating especially this omission to charge, said:—

"* * * This complaint has a real basis. We would not, however, feel justified in subjecting the parties to the delay and expense of a new trial because of the inadequacy of the charge in this feature. The reason is this: the testimony referred to was that of an intelligent and fair witness with a firm grasp of the facts to which he testified. *These were all book-keeping or mathematical facts as he had no knowledge except that derived from the figures submitted to him.*

Italics ours.

> The trial Judge had in mind the definite purpose to advert to this testimony and its application to the case, but he was diverted from this purpose and it was forgotten. Counsel for defendant were in no way responsible for this lapse and their client should not suffer for it. *Nevertheless the fact is they did not call attention to the oversight.* Neither was it the fault of the plaintiffs and they are in no default and the loss should not fall on them." (Record, pages 326, 327.)

Further in the supplemental opinion the learned Judge said:—

> "With respect to the inadequacy of charge feature, all that is intended is that the failure of the trial Judge to specifically call the attention of the jury to the testimony of the witness referred to was, as it has been stated to have been, an oversight. *Had the attention of the trial Judge been called to this, he would have supplied the omission.*" (Record, page 328.)

In this case we have a trial Judge, at the close of his charge, plainly inviting counsel, if they choose to call his attention to any *specific point* they would like to have *specifically answered*, to do so, and he would specifically answer the same. Mr. Bikle, of plaintiff in error's counsel, then asked the Court to charge that in the second period the plaintiff in error questions the correctness of defendant's cost figure, *and also the tonnage*. The Court so charged the jury, and in so doing referred to statements agreed upon by counsel for the plaintiff in error and the defendants in error, which contained the respective statements of their positions and which, it was agreed, were to be sent out with the jury, which was accordingly done. After the Court's general invitation so to do, Mr. Bikle did not call the Court's specific attention to the eighth point alleged as the eleventh assignment of error. What he did was to acquiesce in the agreement to send out with

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Italics ours.

the jury a statement embodying his position, which he had defined but a moment before to the Court. The plaintiff in error only produced one witness, H. H. Twose, whose testimony had sole relevancy to the question of lost tonnage involved in the second period, and of necessity statements of the plaintiff in error in this particular were based upon the tabulations of this witness in Exhibit 3 (Record, page 233). How else can the failure of the learned counsel for the plaintiff in error to avail himself of the opportunity presented by the Court, at the close of his charge, to call his attention to any specific point which they would like to have specifically answered, be explained? The trial Judge, who had evidently overlooked the deep significance of his invitation directed to counsel at the close of his charge, to call his attention to any specific point that they wanted specifically answered, and the statement submitted by agreement to the jury, states and reiterates in his opinion in arrest of judgment, refusing a new trial, and in his supplemental opinion, that had the matter been called to his attention he would have then and there explained the omission or oversight complained of. His attention not having been called thereto, in the light of the full opportunity presented, can advantage now be taken at this late date of the Court's failure to discuss the matter complained of as fully as the plaintiff in error wished? That the trial Judge was correct in his ruling is shown by the following cases:

> By SHARSWOOD, J.:
>
> "If there was a mistake committed as to their testimoney it was evidently an inadvertent one, and had his attention been called to it at the close of the charge, the learned Judge would have referred to his notes and either corrected the one or the other according to the fact. * * * We do not think that the jury were misled by anything in these portions of the charge here assigned for error, and these assignments are therefore dismissed." (Eckman *vs.* Eckman, 68 Pa. 460 (1871), page 469.)

> "The Court need not answer specifically or read to the jury points presented to it if they are substantially negatived in general charge and the jury told all points not answered are refused." (Hommel *vs.* Lewis, 104 Pa. 465 (1883).)

The plaintiff in error cites the case of Pennsylvania Railroad Company *vs.* Jacoby & Company, 242 U. S. 89 (1916) and contends that the testimony in that case was similar to the testimony existing in the present proceedings. Even in the most essential particulars, this statement is not correct.

In the Jacoby case, the Pennsylvania Railroad claimed that the Coal Company had received all the cars to which it was entitled under the Commission's rule of distribution, while the plaintiff in error in the case at bar admits in the very point of controversy in the second period that there was a shortage in the proper supply of cars furnished defendants in error, of 739 cars or 25,865 tons (Transcript of Record, page 315).

Again we find in the Jacoby case that the verdict rendered was in the exact amount of the award sued upon, while in the proceedings pending, the two awards were reduced by the two verdicts in the total sum of $16,358.84.

The plaintiffs in the Jacoby case relied absolutely upon the award, while in these cases the defendant in error was fortified by the testimony of material and corroborating witnesses whose testimony was read into the Record, and referred to the number of working days in the month, the normal cost of production and acts of discrimination, from which the jury might have found that the cost of production was as low as 83 cents a ton, and that the equipment at the mine could easily ship its full rated capacity (Transcript of Record, pages 180, 186 to 189).

In the Jacoby case, the point asking for conclusive instructions was presented, read and refused with other points, at the conclusion of the charge of the Court, while in the case at bar, the points, without reading, were affirmed or refused

in the manner in which reference was made to them in the final charge, and even after an expressed invitation by the Court, no specific request was made by the plaintiff in error for a formal answer to its eighth point, now submitted as its eleventh assignment of error (Transcript of Record, page 302).

In the Jacoby case, no tabulations by the plaintiffs and defendants were sent out with the jury. In the case at bar, such tabulations were, by agreement, sent out with the jury, and the tabulation of the plaintiff in error was a mathematical calculation based on their theory of the case as expressed in the testimony of their witness, Mr. Twose, and the points submitted to the Court (Transcript of Record, page 303).

In the Jacoby case, no admission was made that the tonnage found by the Commission was proper in any period, whereas in the case at bar, it is admitted that the tonnage found by the Commission in the first period is correct, and that, therefore, the correct rule must have been applied, while it is denied that the rule was properly applied in the second period.

We submit that the decision in the Jacoby case is based upon facts entirely different from the case now under consideration by this Court, the conflicting testimony as to these facts was properly sent to the jury for their decision and decided by it.

The Circuit Court of Appeals, in passing upon this specification of error, said (Transcript of Record, page 348):—

> "The next matter concerns the second period only, and presents the objection on which the Railroad seems to lay most weight, namely, that in making the orders for reparation the Commission followed, not its own, but another, rule of distribution. In this respect the Railroad contends that the situation is very much like the situation Railroad *vs.* Jacoby, 242 U. S. , and indeed is controlled by that decision. In our opinion an important difference exists for the following reasons: * * *

"In some respects the case now in hand is like Jacoby's case, but it differs in what we regard as a material particular. Laying aside the fact that the present plaintiffs offered other evidence than the Commission's findings and orders, we think it important to observe that the principal of each verdict is for a sum considerably less than the principal of the Commission's award, so that the recovery here does not rest on the award alone, but is undoubtedly based on all the evidence touching the subject of the plaintiff's damage. As an award by the Commission is only *prima facie* evidence of the amount of damage, it follows that on the trial in the District Court the Railroad may attack the amount, and if the evidence shows that the award is incorrect the jury should follow the evidence and reject the award. We do not decide the question, whether a plaintiff can recover more than the Commission awards, but undoubtedly the Railroad may prove that the sum is too large. As the verdicts here demonstrate, the jury did not follow the orders of the Commission, and it seems to us, therefore, that, even if the awards be calculated on the wrong theory, the plaintiffs have not recovered on this theory, but on other evidence, and are not to be charged with the Commission's possible mistake. In the Jacoby case the jury repeated the Commission's mistake precisely and in this respect the case before us appears to be materially different, for the jury here has rejected the Commission's calculation, and has reached a different result."

4. COMPENSATION FOR DELAY.

The plaintiff in error's own admission that the jury cut down the principal amount of the Commission's finding $16,358.84 seems to give it a degree of satisfaction that is conspicuously absent from the language used in discussing the prior proposition advanced by it. The amount of the award in the first period is not $18,591,48, but *$18,-*

591.48 with interest thereon at the rate of six per cent. per annum from June 28th, 1907, while in the second period, it is not $31,715.57, but *$31,715.57 with interest thereon at the rate of six per cent. per annum from June 28th, 1907, as the* orders for reparation plainly show. The decisions quoted by the plaintiff in error have the virtue of representing a certain line of cases that justify the application of the principle cited in its brief, but no case is cited therein where the interest itself is as much an integral part of the award as the principal itself. Section 8 of the Act to Regulate Commerce provides "such common carrier shall be liable to the person or persons injured thereby for the *full amount* of damages sustained in consequence of such violation of the provisions of the Act to Regulate Commerce." The trial Court upon this question very fairly charged the jury in the following language:

> "Now, if you find for the plaintiff you will include in your verdict such an amount as will compensate him for this difference. It has been some time since the damage was done. Had he received his money then when the damage was freshly done, all he would have been entitled to would have been his damage, but some time has elapsed, necessarily elapsed—and you are not to attach any blame to anybody for that; the problem submitted to the Interstate Commerce Commission was a very complex and difficult problem, and it took a long investigation to determine just what the facts really were; it was nobody's fault that they were not paid at once, because nobody could know then what the damages were, but that is not the fault of any one, and it is not the fault of the plaintiff, and therefore you are to put him back by your award now in the same position as if you had given him the amount of damages at the time at which he was entitled to them." (Record, pages 301-302.)

In the case of Puritan Coal Mining Company *vs.* Pennsylvania Railroad Co., 237 Pa. 434, which was affirmed in

the Supreme Court of the United States in 237 U. S. page 121, and in which was an ultimate recovery of $51,257.85, the Court, in a very pertinent opinion applicable to these cases, in allowing forty-five per cent. additional for delay of seven and one-half years, said:—

> "Applying these principles to the case in hand, was the Court justified, acting as he was as the jury in this case, in assessing forty-five per cent. as compensation for the delay? The law, the facts and the justice of this case, as we believe, justify the allowance. To determine this a brief review of the case and the claim is necessary. The original praecipe, filed March 26th, 1908, claimed for damages not exceeding $75,000. Plaintiff's statement, filed November 21st, 1908, claimed the right to recover $49,936.07, with an additional amount to compensate for delay. About the same time plaintiff brought suit in the Circuit Court of the United States, against the same defendant, claiming the right to recover $242,999.65, for the same alleged discrimination based on identically the same facts, claiming, however, to recover in that Court because of the jurisdiction of said Court over interstate commerce. On April 3d, 1911, plaintiff in this case was allowed to amend its praecipe by substituting a statement for damages to the amount of $300,000, instead of $75,000, and a declaration was filed in this Court claiming the right to recover $260,777.96, on exactly the same alleged discriminatory acts as in the original statement" (page 434).

The Circuit Court of Appeals, in passing upon this specification of error, said (Transcript of Record, page 351):—

> "Besides, if the subject should be within our power on this record, the amount of this allowance, whether by the Commission or by the jury, does not seem to us excessive, and we see no reason on this account to interfere with the verdict."

5. AWARD OF COUNSEL FEES.

Opposition is made by the plaintiff in error to the allowance of counsel fees aggregating $10,000 in the two cases, in which the aggregate amount of the judgments entered was $49,711.29. It is submitted that the opinion of the learned trial Judge closely follows the principles announced in the allowance of counsel fees in the case of Meeker *vs.* L. V. R. R. Co., 236 U. S. 412 (1915). The trial Judge not only professed to exclude an allowance for services rendered in proceedings before those taken in Court, but he actually did exclude allowances for any work done before the Commission in the following language:—

> "It has been ruled that the Act provides only for counsel fees in the proceeding at law, and that no allowance can be made for services rendered before the Interstate Commerce Commission. We have, therefore, restricted the allowance by excluding all proceedings before those begun in this Court. (Record, page 330.)
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> * * * * * * *
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> "It is not that they should be allowed now for these past services because this should not be done and is not done." (Record, page 331.)

For the plaintiff in error to represent that the trial Judge was without the requisite knowledge to enable him to determine what the amount of the fee should be, and to insinuate in the same paragraph that he had no evidence of the time and labor involved in the preparation of the cases, is unfair and misleading, for the reason that the motion for the allowance of attorney fees in both cases was made immediately after the jury had retired and in the presence of counsel for the plaintiff in error. The amount of time and labor involved in the preparation of the cases was discussed before the Court, and participated in by counsel on both sides. The counsel fee allowed in both cases is an extremely reasonable fee for the amount of time and labor

involved in the preparation and trial of these cases. It must be borne in mind that the petitions in the cases at bar were filed February 7th, 1913, and the proceedings have continued over a long period of time. The discussion by the learned trial Judge of the subject matter involved is full and complete, and justifies his discretion in fixing fees in these cases which it is submitted are fair and reasonable.

The Circuit Court of Appeals, in passing upon this specification of error, said (Transcript of Record, page 351):—

> "As to the award of counsel fees, we are similarly uncertain. We accept the statement of the trial Judge that he confined himself to compensation for services in the District Court, and as we do not know what facts he had before him, we are unable to say that any abuse of discretion appears from the mere amount of his award."

All of which is respectfully submitted.

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